

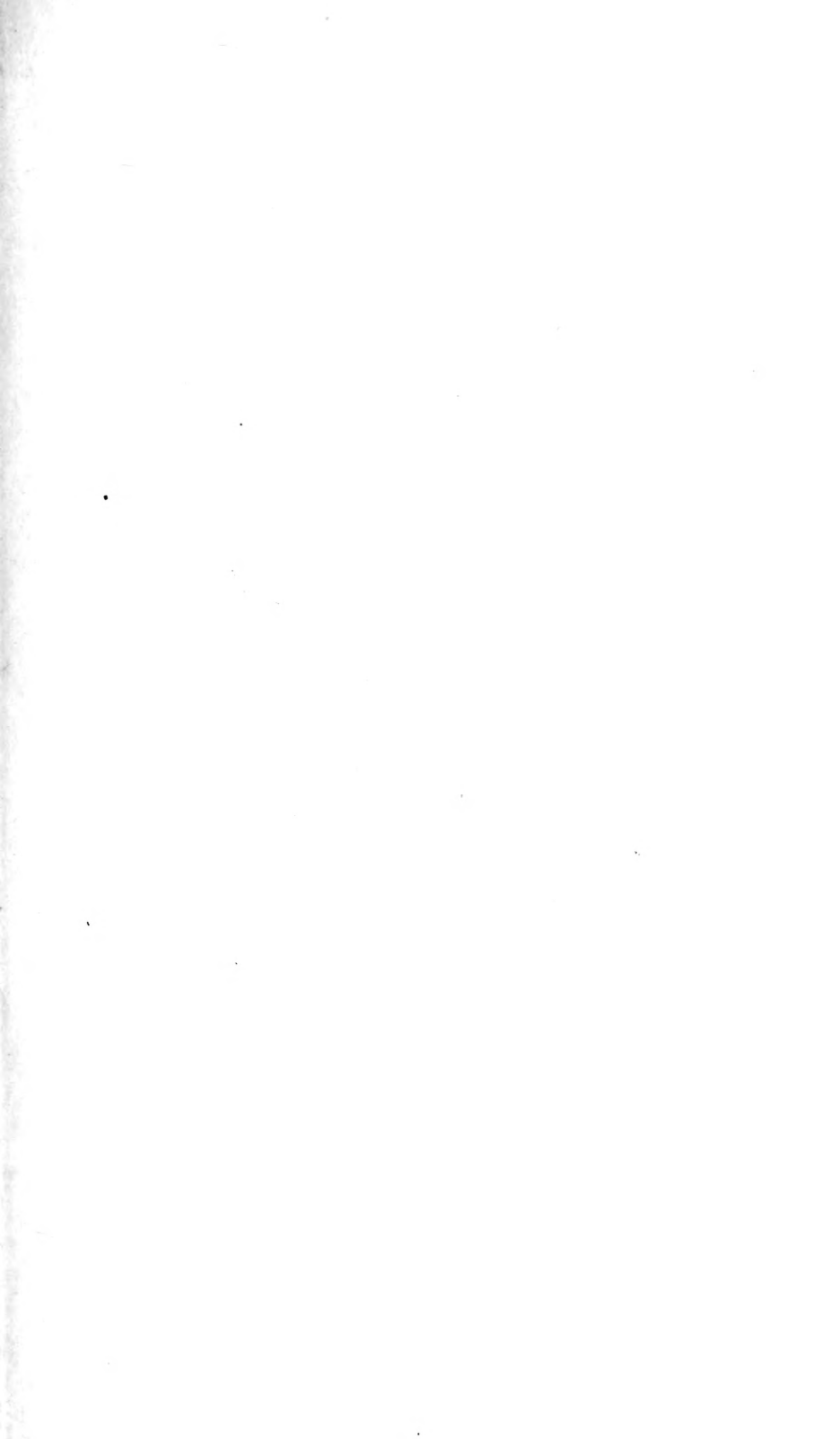
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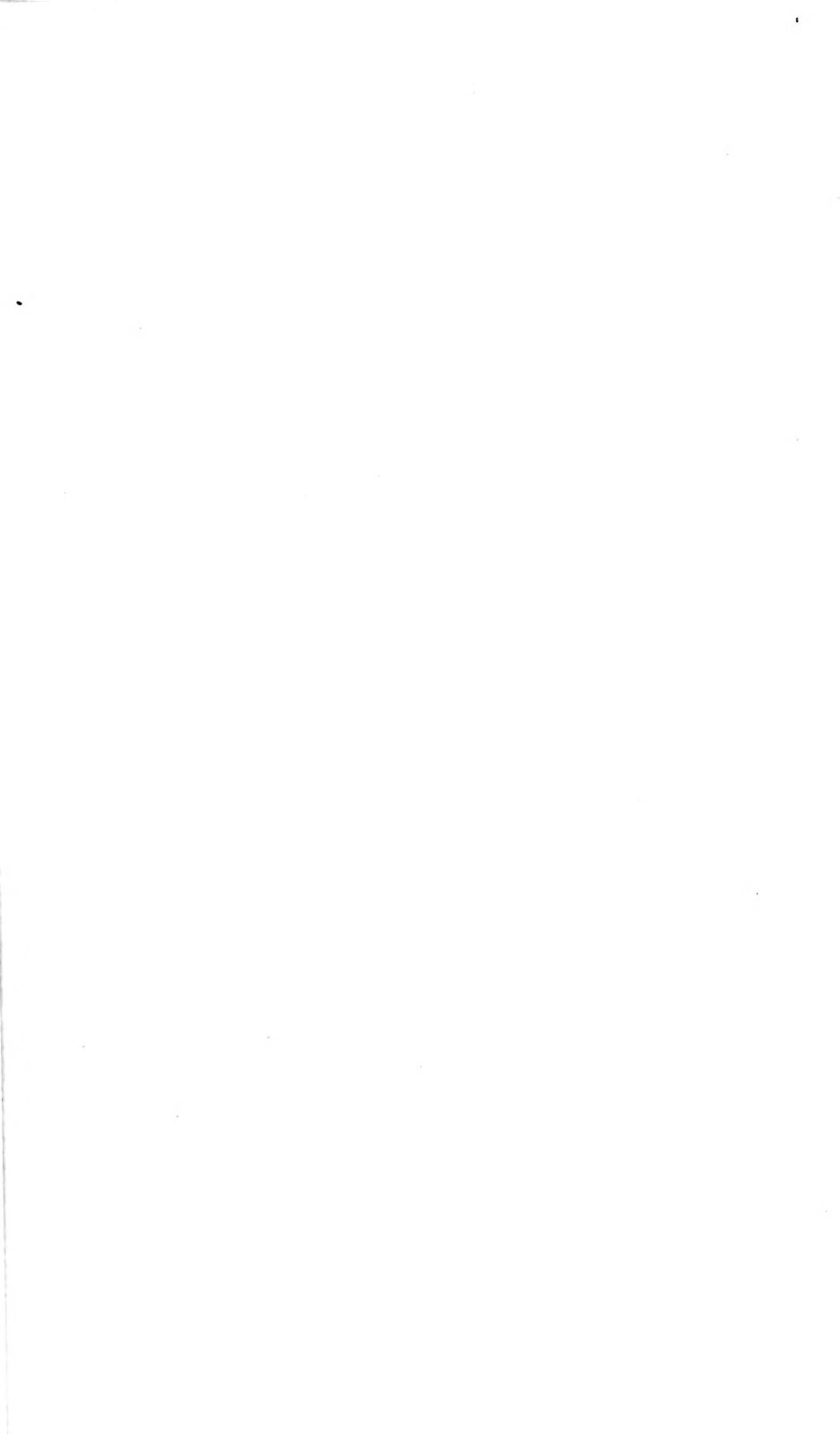
No. 123473

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

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No. 10493

United States
Circuit Court of Appeals

For the Ninth Circuit.

STATE OF WASHINGTON and EQUITABLE LIFE INSUR-
ANCE COMPANY OF IOWA,

Appellants,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED. OGLESBY
and PHIL ISLEY, Constituting the Board of Supervisors
of Maricopa County, Arizona; SIDNEY P. OSBORN, Gov-
ernor, ANA FROHMILLER, State Auditor, and JIM
BRUSH, State Treasurer, Constituting the Loan Commis-
sioners of the State of Arizona; JIM BRUSH, State Treas-
urer, and ANA FROHMILLER, State Auditor of the
State of Arizona,

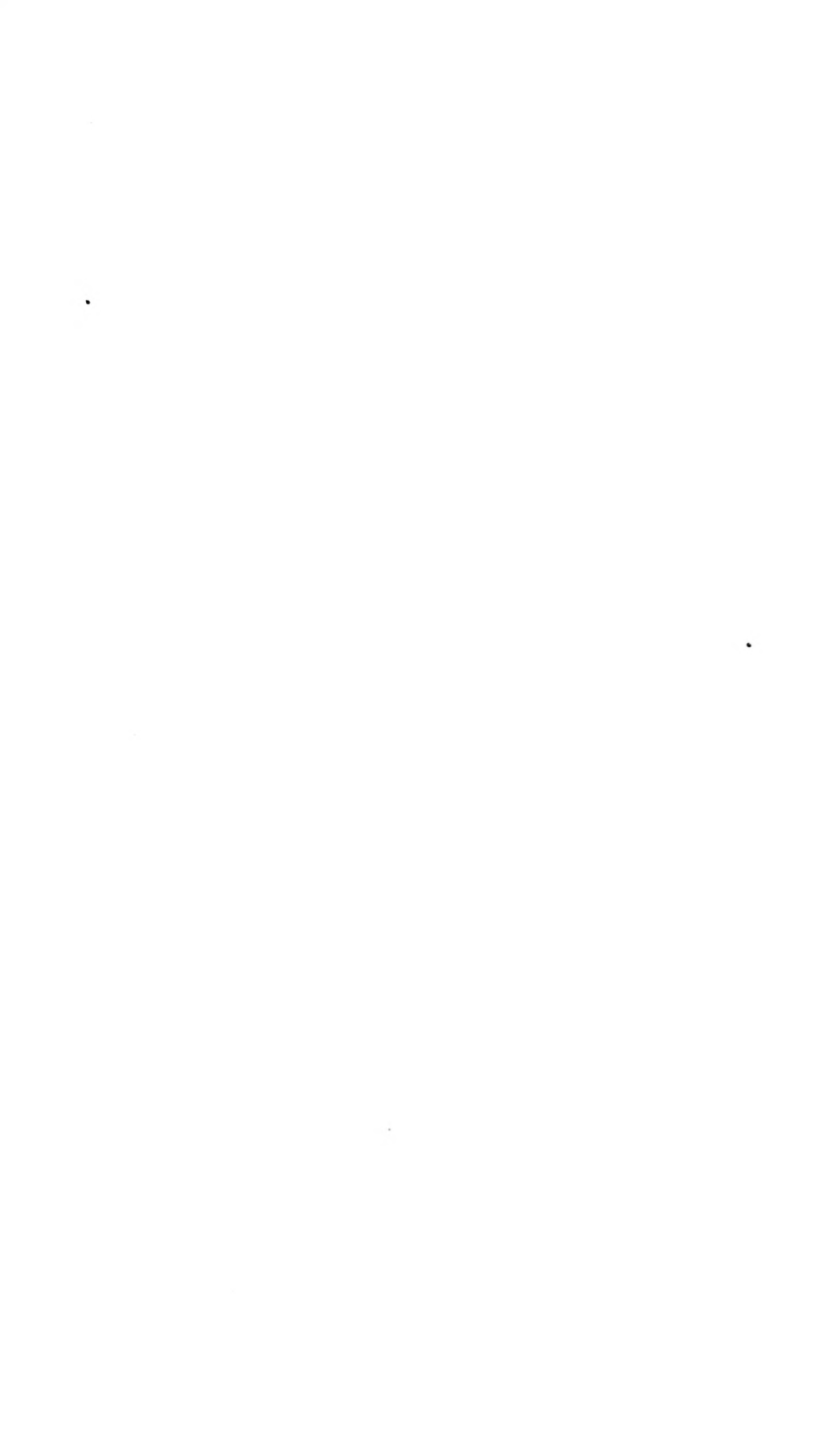
Appellees.

Transcript of Record

**Upon Appeal from the District Court of the United States
for the District of Arizona**

FILED

AUG - 5 1943



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Circuit Court of Appeals

For the Ninth Circuit.

STATE OF WASHINGTON and EQUITABLE LIFE INSURANCE COMPANY OF IOWA,

Appellants,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED. OGLESBY and PHIL ISLEY, Constituting the Board of Supervisors of Maricopa County, Arizona; SIDNEY P. OSBORN, Governor, ANA FROHMILLER, State Auditor, and JIM BRUSH, State Treasurer, Constituting the Loan Commissioners of the State of Arizona; JIM BRUSH, State Treasurer, and ANA FROHMILLER, State Auditor of the State of Arizona,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court
For the District of Arizona

No. Civil—379—Phoenix.

STATE OF WASHINGTON and EQUITABLE
LIFE INSURANCE COMPANY OF IOWA,
Plaintiffs,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED.
OGLESBY and PHIL ISLEY, Constituting
the Board of Supervisors of Maricopa County,
Arizona; SIDNEY P. OSBORN, Governor,
ANA FROHMILLER, State Auditor, and JIM
BRUSH, State Treasurer, Constituting the
Loan Commissioners of the State of Arizona;
JIM BRUSH, State Treasurer, and ANA
FROHMILLER, State Auditor of the State of
Arizona,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY
JUDGMENT DECLARING THAT CERTAIN
BONDS OF MARICOPA COUNTY ARE
NOT SUBJECT TO CALL BEFORE THEIR
DUE DATE

Come now the State of Washington and Equitable
Life Insurance Company of Iowa, the plaintiffs,
and for cause of action against the defendants, allege
as follows:

I.

That plaintiff, State of Washington, is a sovereign
state of the United States of America; that plaintiff

Equitable Life Insurance Company of Iowa, is a corporation organized under the insurance laws of the State of Iowa and having its principal place of business at Des Moines in said state, and is a citizen and resident of the State of Iowa. [47]

II.

That defendant, Maricopa County, is a county of the State of Arizona; that John A. Foote, Ed. Oglesby and Phil Isley constitute the Board of Supervisors of said Maricopa County; that Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor, and Jim Brush, State Treasurer, constitute the Loan Commissioners of the State of Arizona; that defendant Jim Brush is the State Treasurer of the State of Arizona and Ana Frohmiller is the State Auditor of the State of Arizona; that the individual defendants above named are sued herein in their official capacity above set forth. That all of said individual defendants are citizens and residents of Arizona.

III.

That jurisdiction of the United States District Court For the District of Arizona is invoked in this suit first, upon the ground that this is a case arising under the Constitution and laws of the United States, and second, upon the ground that it is a case between a state and citizens of another state and between citizens of different states.

IV.

That the plaintiff, State of Washington, owns and holds a total of \$236,000.00 par value of the

two issues of Maricopa County Highway Bonds hereinafter described; that \$31,000.00 of said bonds are of the issue of 1919, bearing 5½% interest per annum, of which the numbers and due dates are as follows:

2,222-7 and 2,253-6 due June 15, 1943,
2,540-3 and 2,782 due June 15, 1945,
2,830, 2,849-50, 2918 and 2971-4 due June 15,
1946,
3,225-6 due June 15, 1947,
3511, 3550 and 3,586 due June 15, 1948.
3,944-5 and 3,966 due June 15, 1949;

That \$205,000.00 par value of said bonds are of the issues of 1921, bearing 6% interest per annum of which the num- [48] bers and due dates are as follows:

6,171 due January 15, 1944,
6,309-14, 6366-70, 6,384-90 and 6,485 due
January 15, 1945,
6,576-80, 6,661, 6,663-4, 6,667-70 and 6,800 due
January 15, 1946,
6,801-22, 7011-15, 7-016-25 due January 15,
1947,
7,106-20, 7,124-5, 7-151-70, 7-251-4, 7-301-5,
7,321-5 and 7,371-5 due January 15, 1948,
7,401-20, 7,451-5 due January 15, 1949,
7,786-95, 7,799—7,818 and 7,912 due January
15, 1950,
8,205-23, 8,294-6 and 8,400 due January 15,
1951.

That all of the aforesaid bonds are due and payable

as of the respective due dates above set forth without acceleration of maturity; that the difference between the value of the above mentioned bonds if defendant, Maricopa County, is legally bound to pay the agreed rate of the interest thereon until the respective due dates therein specified, as is contended by plaintiffs, and the value of said bonds if they are presently subject to call for redemption by said Maricopa County, as is contended by defendants, greatly exceeds the sum of Three Thousand (\$3,000.00) Dollars.

V.

That plaintiff, Equitable Life Insurance Company of Iowa, owns and holds a total of Ninety-one Thousand (\$91,000.00) Dollars par value of the 1921 issue of Maricopa County Highway Bonds, hereinafter described; that said bonds bear interest at the rate of six (6%) per cent per annum, and the numbers and due dates thereof are as follows:

6,116-6,153, inclusive, 6,200, 6,203-6,219 inclusive, amounting to \$56,000.00, due January 15, 1944,

6,919-6,943, inclusive, amounting to \$25,000.00, due January 15, 1947,

7,331-7,335, inclusive, 7,390-7,394, inclusive, amounting to \$10,000.00, due January 15, 1948.

That all of said bonds are due and payable as of the due dates above set forth without acceleration of maturity; that the difference between the value of the above mentioned [49] bonds of said last mentioned plaintiff, if defendant Maricopa County is

legally bound to pay the agreed rate of interest thereon until the respective due dates therein specified as is contended by plaintiffs, and the value of said bonds, if they are presently subject to call for redemption by said Maricopa County, as is contended by defendants, greatly exceeds the sum of Three Thousand (\$3,000.00) Dollars.

VI.

That at all times when any bonds herein mentioned as held by plaintiffs were voted, authorized, advertised for sale, sold, issued, paid for and delivered, the counties of the State of Arizona, of which defendant, Maricopa County, is one, were authorized and empowered to issue negotiable bonds under the terms and provisions of Chapter II, Title 52, Sections 5266 to 5285, Revised Statutes of Arizona for 1913; that said Chapter II, Title 52 among other things provided that if the proposed indebtedness to be created by said bonds would cause said county to become indebted in excess of four (4%) per cent of the value of taxable property in such county to be ascertained by the last assessment for State and County purposes previous to such proposed incurring of such indebtedness, said proposed bond issue should be submitted to the property taxpayers of the county, and said Chapter II, Title 52 contained the following specific provisions:

(1) In Section 5273, that in the call for election there shall be "set forth the aggregate amount of said bonds, the term thereof, the rate of interest to be paid thereon, when such interest shall be paid, the date of maturity of said bonds, or other evi-

dences of indebtedness and the purposes for which the money derived from the sale of such bonds or other evidence of indebtedness shall be expended.”

[50]

(2) In Section 5274 that said bonds “shall be signed and attested * * * by the Chairman and Clerk of the Board of Supervisors”, and further, that “said bonds shall be payable at a date not to exceed forty (40) years from the date of their issuance.”

(3) In Section 5275, that “said bonds shall be payable to bearer and coupons for the interest shall be attached to each of the said bonds.”

(4) In Section 5275, “that none of said bonds or other evidences of indebtedness shall be sold for a less amount than par with accrued interest”.

(5) In Section 5278, “and until all of said bonds or other evidences of indebtedness of such county are redeemed the board of supervisors of such county where such indebtedness is created under the provisions of this chapter * * * is authorized, and it shall be its duty, to levy and cause to be collected a tax in addition to the amount of taxes which now or hereafter may be authorized by law for state and county purposes at the same time and in the same manner as other taxes are levied and collected by such county * * * upon all taxable property in such county * * * sufficient to pay the interest on all bonds issued when such interest shall become due, and said tax when collected shall constitute a fund for the payment of interest on said bonds

or other evidences of indebtedness and shall be called 'Interest Fund'."

(6) In Section 5279, "The Board of Supervisors of any county wherein any indebtedness shall be created under the provisions of this chapter * * * shall also, and in addition to the taxes for state and county purposes, * * * and the tax hereinabove provided to be levied for the payment of interest on such bonds or other evidences of indebtedness, levy a tax [51] for the purpose of redeeming said bonds or other evidence of indebtedness when the same shall mature as specified in the order and call for election hereinbefore in this chapter provided to be made, and all money derived from the levy of the tax in this section provided for when collected shall constitute a fund and shall be called the 'Redemption Fund' and shall be used for the redemption of said bonds or other evidences of indebtedness according to the number of their issue. The tax in this section provided to be levied shall be levied annually so as to provide a fund for the redemption of such bonds or other evidences of indebtedness when the same shall mature."

(7) In Section 5281, "When any bonds or other evidences of indebtedness created under the provisions of this chapter shall mature it shall be the duty of the county treasurer * * * to give notice for four weeks in some newspaper published in the county in which such bonds or other evidences of indebtedness shall have been issued, of the intention of such county * * * to redeem such bonds, stating the amount thereof, and such redemption

shall be made by the county * * * and all said bonds or evidences of indebtedness shall cease to draw interest at the expiration of four weeks after the date of said notice, and if said bonds so noticed for redemption shall not be presented for redemption within three months from the date of such notice said county treasurer * * * shall apply said money to the redemption of the bonds next in the order of the number of their issue."

(8) In Section 5281, "The Board of Supervisors * * * issuing bonds or other evidences of indebtedness under provisions of this chapter shall, by resolution entered upon its minutes prior to the offering for sale of said bonds or other evidences of indebtedness, and within a period of fifteen (15) [52] days from the canvassing of the vote of the election herein provided for, prepare a form of bond which shall substantially conform to the description of said bonds mentioned in the order required by this chapter published and recorded."

VII.

That there was no provision whatsoever in said Chapter II, Title 52, Arizona Revised Statutes of 1913, nor any statute, law, custom or practice of the State of Arizona at the date of the issuance of the bonds hereinabove mentioned, authorizing or contemplating the calling of said bonds before their maturity dates, and that the only provision of the statutes, laws, customs or practice of the State of Arizona and the counties and other legal subdivisions thereof at the time of the issuance of the

above mentioned bonds were the express provisions of the statute above set forth authorizing a redemption of said bonds after the maturity dates thereof.

VIII.

That in the year 1917 there was passed and became a law of the State of Arizona, Chapter 31 of Arizona Session Laws of 1917, which provides for the creation of county highway commissions and expressly authorizes the issuance of bonds for the construction and improvement of highways of the county. Said section provides that bonds might be issued and sold as other county bonds. That said Chapter 31 above mentioned was amended on March 17th, 1919, by Chapter 63 of the Session Laws of 1919, and on March 19th, 1919, by Chapter 101 of the Session Laws of 1919, and on March 20th, 1919 by Chapter 121 of the Session Laws of 1919. That none of such amendments made any change in said Chapter 31 material to the issues of this case.

IX.

That pursuant to said Chapter 31 of the Session Laws [53] of 1917, the Board of Supervisors of defendant, Maricopa County, on April 10th, 1919, adopted an order calling an election of the property taxpayers of said county to be held May 17th, 1919, to determine whether the bonds of said county in the sum of Four Million (\$4,000,000.00) Dollars, should be issued and sold for the purpose of constructing and improving hard surfaced highways in said county, and said resolution specified that

the rate of interest of said proposed bonds should be five and one-half ($5\frac{1}{2}\%$) per cent per annum, payable semi-annually, and the terms and dates of maturity of said bonds should be as follows:

“\$100,000.00 thereof to run for a term of 11 years and to mature on June 15, A. D. 1930;

\$100,000.00 thereof to run for a term of 12 years and to mature on June 15, A. D. 1931;

\$100,000.00 thereof to run for a term of 13 years and to mature on June 15, A. D. 1932;

\$100,000.00 thereof to run for a term of 14 years and to mature June 15, 1933;

\$100,000.00 thereof to run for a term of 15 years and to mature on June 15, 1934;

\$200,000.00 thereof to run for a term of 16 years and to mature on June 15, 1935;

\$200,000.00 thereof to run for a term of 17 years and to mature on June 15, 1936;

\$200,000.00 thereof to run for a term of 18 years and to mature on June 15, 1937;

\$200,000.00 thereof to run for a term of 19 years and to mature on June 15th, 1938;

\$200,000.00 thereof to run for a term of 20 years and to mature on June 15, 1939;

\$200,000.00 thereof to run for a term of 21 years and to mature on June 15, 1940;

\$200,000.00 thereof to run for a term of 22 years and to mature on June 15, 1941;

\$200,000.00 thereof to run for a term of 23 years and to mature on June 15, 1942;

\$200,000.00 thereof to run for a term of 24 years and to [54] mature on June 15, 1943;

\$200,000.00 thereof to run for a term of 25 years and to mature on June 15, 1944;

\$300,000.00 thereof to run for a term of 26 years and to mature on June 15, 1945;

\$300,000.00 thereof to run for a term of 27 years and to mature June 15, 1946;

\$300,000.00 thereof to run for a term of 28 years and to mature June 15, 1947;

\$300,000.00 thereof to run for a term of 29 years and to mature June 15, 1948; and

\$300,000.00 thereof to run for a term of 30 years and to mature June 15, 1949”.

That notice of said election was given by posting and publication as provided by law and that said notice so posted and published was the order for election and contained the description of said bonds as above set forth including the terms and dates of maturity thereof.

X.

That said bonds were approved by the majority of the property taxpayers of the county at said election, and thereafter, on June 2nd, 1919, the said Board of Supervisors of said county canvassed the returns of said election and embodied the facts determined upon said canvass in a certificate and filed and recorded the same in the office of the County Recorder of said county, and in said certificate it was declared as follows:

“That the rate of interest upon said proposed

bonds is to be five and one-half ($5\frac{1}{2}\%$) per cent per anum, payable semi-annually and the terms and dates of maturity of said bonds to be as follows, to-wit:

\$100,000.00 thereof to run for a term of 11 years and to mature on June 15, A. D. 1930;

\$100,000.00 thereof to run for a term of 12 years and to mature on June 15, A. D. 1931;

\$100,000.00 thereof to run for a term of 13 years to mature on June 15, A. D. 1932; [55]

\$100,000.00 thereof to run for a term of 14 years and to mature on June 15, A. D. 1933;

\$100,000.00 thereof to run for a term of 15 years and to mature on June 15, A. D. 1934;

\$200,000.00 thereof to run for a term of 16 years and to mature on June 15, A. D. 1935;

\$200,000.00 thereof to run for a term of 17 years and to mature on June 15, A. D. 1936;

\$200,000.00 thereof to run for a term of 18 years and to mature on June 15, A. D. 1937;

\$200,000.00 thereof to run for a term of 19 years and to mature on June 15, A. D. 1938;

\$200,000.00 thereof to run for a term of 20 years and to mature on June 15, A. D. 1939;

\$200,000.00 thereof to run for a term of 21 years and to mature on June 15, A. D. 1940;

\$200,000.00 thereof to run for a term of 22 years and to mature on June 15, A. D. 1941;

\$200,000.00 thereof to run for a term of 23 years and to mature on June 15, A. D. 1942;

\$200,000.00 thereof to run for a term of 24 years and to mature on June 15, A. D. 1943;

\$200,000.00 thereof to run for a term of 25 years and to mature on June 15, A. D. 1944;

\$300,000.00 thereof to run for a term of 26 years and to mature June 15, A. D. 1945;

\$300,000.00 thereof to run for a term of 27 years and to mature on June 15, A. D. 1946;

\$300,000.00 thereof to run for a term of 28 years and to mature on June 15, A. D. 1947;

\$300,000.00 thereof to run for a term of 29 years and to mature on June 15, A. D. 1948; and

\$300,000.00 thereof to run for a term of 30 years and to mature on June 15, A. D. 1949."

XI.

That thereafter, on June 4th, 1919, the said Board of Supervisors adopted a resolution preparing and fixing the form of said bonds and in said resolution declared that "The bonds of the County of Maricopa to be issued and sold pursuant to [56] the county road bond election held May 17, 1919 in the total amount of Four Million (\$4,000,000.00) Dollars, shall be of the denomination of One Thousand (\$1,000.00) Dollars each; shall be Four Thousand (4,000) in number, shall be numbered from one (1) to four thousand (4,000) inclusive; shall be each dated June 15, 1919; shall each bear interest from date thereof at the rate of five and one-half ($5\frac{1}{2}\%$) per cent per annum, payable semi-annually on the 15th day of June and December of each year at the office of the County Treasurer of said

County of Maricopa; and shall mature upon the respective dates specified in the resolution of the Board of Supervisors dated April 10, 1919, calling the aforesaid election, and on the ballots used by the electors at said election and in the certificate of the Board of Supervisors heretofore and on June 2, 1919 filed in the office of the County Recorder of said Maricopa County; and shall each and all strictly conform in their tenor and terms to the aforesaid resolution calling said road bond election''. That the form of bond thereafter set forth in said resolution is attached hereto marked "Exhibit A" and made a part hereof.

That said resolution further provided "That each of the said series of four thousand (\$4,000.00). bonds shall have attached thereto such number of semi-annual interest coupons in the sum of twenty-seven dollars and fifty cents (\$27.50) each, and payable on the 15th day of June and the 15th day of December of each year during the term of said bond, as shall be sufficient to evidence all the interest to become due on said bond during the term thereof; and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit:

The County of Maricopa, State of Arizona, hereby promises to pay to the holder hereof on the 15th day of [57] 19...., at the office of the County Treasurer of the County of Maricopa, State of Arizona, Twenty-seven dollars and fifty cents in gold coin of the United States, for

the semi-annual interest on its highway bond numbered

Election of May 17, 1919.

W. K. BOWEN

Chairman of the Board of Supervisors of Maricopa County, State of Arizona.

Attest:

CLARENCE L. STANDAGE

Clerk of the Board of Supervisors of Maricopa County, State of Arizona.

\$27.50

Coupon Number"

XII.

That no recital in said bonds or coupons nor any statement therein contained, gave any indication whatsoever that said bonds or any of them were subject to call for redemption before their maturity dates, nor did any recital or statement in said bonds or coupons call attention to any statute, law, practice or custom, providing for the call of said bonds for redemption before their respective due dates, and no such statutes, law, practice or custom ever existed or was suggested in the state of Arizona prior to the attempt to call such bonds for redemption in the year 1942.

XIII.

That thereafter said Board of Supervisors caused to be published a notice inviting proposals for the purchase of said bonds, and said notice contained the following provision:

“Said bonds to be serial bonds, part of which shall mature on the 15th day of June of each year from the year 1930 to the year 1949, both inclusive, as more specifically described in that certificate of the Board of Supervisors relating to said bonds recorded in the office of the County Recorder of Maricopa County on June 2, 1919, in Book 19 of Miscellaneous Records, at page 357.” [58]

That the certificate referred to was so recorded in the County Recorder's office and gave the dates of maturity of said bonds as set forth in the order for said bonds hereinabove set forth.

XIV.

That bids for said bonds were received and the bid of Graves, Blanchet and Thornburgh and associates, was accepted. Said bid contained the following provisions:

“For the Four Million Dollars par value legally issued Highway Bonds of Maricopa County, Arizona, complying in all respects with the description of same as contained in your official advertisement of sale, and to be delivered to us on the basis of delayed deliveries as outlined in your Official Notice of Sale, we will pay par and accrued interest to date of deliveries of the bonds, and in addition thereto a premium of Thirty-two Thousand Five Hundred (\$32,500.00) Dollars.”

XV. .

That after the said bid was accepted, and on the 9th day of July, 1919, defendant Maricopa County, entered into a formal written contract with the bidders, providing for the sale and purchase of said bonds and that in said contract said Maricopa County expressly covenanted and agreed to sell to the purchasers and the purchasers covenanted and agreed to purchase from said Maricopa County, "the highway bonds of said Maricopa County authorized to be issued by the election held May 17th, 1919, in the amount of \$4,000,000.00 par value; said bonds to comply in all respects with the description of the same as contained in the 'Notice Inviting Proposals hereinabove set forth'." That said contract was regularly executed by the Chairman and Clerk of the Board of Supervisors of said Maricopa County by authority of a resolution adopted by said Board of Supervisors on July 9th, 1919.

XVI.

That after all of said issue of bonds had been executed [59] upon the form set forth in "Exhibit A" hereto attached, and the bid of the purchasers therefor had been accepted, and the formal contract for the purchase thereof between said Maricopa County and the purchasers had been executed, and after three thousand of said bonds had been delivered to the purchasers and one thousand of said bonds remained to be delivered to said purchasers the legislature of the State of Arizona adopted Chapter 54 of the Sessions Laws of 1921,

ratifying, approving and validating said bonds and the sale thereof, and in said Act said legislature declared, "that the bonds of the County of Maricopa in the sum of Four Million (\$4,000,000.00) Dollars, authorized by the election of the property taxpayers of said county held May 17, 1919, for the purpose of providing funds for the construction and improvement of certain portions of the public highway of Maricopa County and the contract for the sale of such bonds entered into by the Board of Supervisors of said Maricopa County, with Graves, Blanchett, Thornburgh, and associates, on the 9th day of July, 1919, are hereby ratified, approved and declared valid", and in said Act said legislature further declared that, "all acts and parts of acts in conflict with the provisions of this act are hereby repealed".

XVII.

That after the ratification of said bonds by said Chapter 54 of the Session Laws of 1921, they sold readily on the open market and thereafter the plaintiffs, in reliance upon the proceedings of said Board of Supervisors hereinabove set forth, and the maturity dates of said bonds as set forth in said proceedings, and said bonds and the covenants of said Maricopa County to pay interest on said bonds to the maturity dates thereof as specified in said bonds, and the above mentioned Act of the legislature of the State of Arizona, ratifying [60] and approving said bonds in the form authorized as above set forth, and the Contract and Agreement entered into by said Maricopa

County and the purchasers of said bonds each of the plaintiffs purchased the bonds now owned and held by it, and paid a large premium for the right to collect interest on said bonds at the rate therein specified until the respective maturity dates specified in said bonds.

XVIII.

That pursuant to said Chapter 31 of the Session Laws of 1917 and amendments thereto the Board of Supervisors of defendant Maricopa County, on November 30, 1920, adopted an order calling an election of the property taxpayers of said county to be held December 31, 1920, to determine whether the bonds of said county in the additional sum of \$4,500,000.00 should be issued and sold for the purpose of constructing and improving hard surfaced highways in said county, and said resolution specified that the rate of interest of said proposed bonds should be 6% per annum, payable semi-annually, and the terms and dates of maturity of said bonds should be as follows:

\$100,000.00 thereof to run for a term of 10 years and to mature on January 15, A. D. 1931,

\$100,000.00 thereof to run for a term of 11 years and to mature on January 15, A. D. 1932,

\$100,000.00 thereof to run for a term of 12 years and to mature on January 15, A. D. 1933,

\$100,000.00 thereof to run for a term of 13 years and to mature January 15, 1934.

\$100,000.00 thereof to run for a term of 14 years and to mature on January 15, 1935,

\$200,000.00 thereof to run for a term of 15 years and to mature on January 15, 1936,

\$200,000.00 thereof to run for a term of 16 years and to mature on January 15, 1937,

\$200,000.00 thereof to run for a term of 17 years and to mature on January 15, 1938, [61]

\$200,000.00 thereof to run for a term of 18 years and to mature on January 15, 1939,

\$200,000.00 thereof to run for a term of 19 years and to mature on January 15, 1940,

\$200,000.00 thereof to run for a term of 20 years and to mature on January 15, 1941,

\$200,000.00 thereof run for a term of 21 years and to mature on January 15, 1942,

\$200,000.00 thereof to run for a term of 22 years and to mature on January 15, 1943,

\$200,000.00 thereof to run for a term of 23 years and to mature on January 15, 1944,

\$200,000.00 thereof to run for a term of 24 years and to mature on January 15, 1945,

\$300,000.00 thereof to run for a term of 25 years and to mature on January 15, 1946,

\$300,000.00 thereof to run for a term of 26 years and to mature January 15, 1947,

\$300,000.00 thereof to run for a term of 27 years and to mature January 15, 1948,

\$300,000.00 thereof to run for a term of 28 years and to mature January 15, 1949,

\$300,000.00 thereof to run for a term of 29 years and to mature January 15, 1950, and

\$500,000.00 thereof to run for a term of 30 years and to mature January 15, 1951.

That notice of said election was given by posting and publication as provided by law and that said notice so posted and published was the order for election and contained the description of said bonds as above set forth, including the terms and dates of maturity thereof.

XIX.

That said bonds were approved by the majority of the property taxpayers of the county at said election, and thereafter, on January 20, 1921, the said Board of Supervisors of said county canvassed the returns of said election and declared said bond issue to have been approved by said taxpayers and [62] thereafter, on November 2, 1921, said Board of Supervisors embodied the facts determined from said canvass in a certificate and filed and recorded the same in the office of the county recorder of said county, and in said certificate it was declared as follows:

“The rate of interest upon the said proposed bonds shall be six percentum (6%) per annum, payable semi-annually and the terms and dates of maturity of said bonds shall be as follows, to-wit:

\$100,000.00 thereof to run for a term of 10 years and to mature on January 15, A. D. 1931;

\$100,000.00 thereof to run for a term of 11 years and to mature on January 15, A. D. 1932;

\$100,000.00 thereof to run for a term of 12 years and to mature on January 15, A. D. 1933;

\$100,000.00 thereof to run for a term of 13 years and to mature on January 15, 1934;

\$100,000.00 thereof to run for a term of 14 years and to mature on January 15, 1935;

\$200,000.00 thereof to run for a term of 15 years and to mature on January 15, 1936;

\$200,000.00 thereof to run for a term of 16 years and to mature on January 15, 1937;

\$200,000.00 thereof to run for a term of 17 years and to mature on January 15, 1938;

\$200,000.00 thereof to run for a term of 18 years and to mature on January 15, 1939;

\$200,000.00 thereof to run for a term of 19 years and to mature on January 15, 1940;

\$200,000.00 thereof to run for a term of 20 years and to mature on January 15, 1941;

\$200,000.00 thereof to run for a term of 21 years and to mature on January 15, 1942;

\$200,000.00 thereof to run for a term of 22 years and to mature on January 15, 1943;

\$200,000.00 thereof to run for a term of 23 years and to mature on January 15, 1944;

\$200,000.00 thereof to run for a term of 24 years and to mature on January 15, 1945;

\$300,000.00 thereof to run for a term of 25 years and to mature on January 15, 1946; [63]

\$300,000.00 thereof to run for a term of 26 years and to mature January 15, 1947;

\$300,000.00 thereof to run for a term of 27 years and to mature January 15, 1948;

\$300,000.00 thereof to run for a term of 28 years and to mature January 15, 1949;

\$300,000.00 thereof to run for a term of 29 years and to mature January 15, 1950; and

\$500,000.00 thereof to run for a term of 30 years and to mature January 15, 1951.”

XX.

That thereafter, on the 2nd day of November, 1921, the said Board of Supervisors adopted a resolution preparing and fixing the form of said bonds and in said resolution declared that:

“The bonds of the County of Maricopa to be issued and sold pursuant to the County Road Bond Election held December 31, 1920, in the total amount of Four Million Five Hundred Thousand (\$4,500,000.00) Dollars, shall be in the denomination of One Thousand (\$1,000.00) Dollars each, shall be four thousand five hundred (4,500) in number, shall be numbered from 4,001 to 8,500, inclusive, shall each be dated January 15, 1921, shall each bear interest from the date thereof at the rate of 6% per annum, payable semi-annually on the 15th day of January and July in each year at the office of the County Treasurer of the said County of Maricopa, State of Arizona, and shall mature upon the respective dates specified in the resolution of the Board of Supervisors, dated the 16th day of August, calling for the aforesaid election, and on the ballots for the electors in the said election and in the certificate of the Board of Supervisors heretofore on the 8th day of November, 1921, filed in the office of the County Recorder of Maricopa County, and each and all shall strictly conform in tenor and terms to the aforesaid resolution calling said Road Bond Election, the ballots used by the electors at said election, and the aforesaid certificate

of the Board of Supervisors recorded on November 8, 1921”.

That the form of bond thereafter set forth in said Resolution is attached hereto, marked “Exhibit B”, and made a part hereof. [64]

That said resolution further provided, “That each of the said series of four thousand five hundred (4,500) bonds shall have attached thereto such number of semi-annual interest coupons in the sum of Thirty Dollars (\$30.00) each, and payable on the 15th. day of January and the 15th. day of July of each year during the term of said bond, as shall be sufficient to evidence all the interest to become due on said bond during the term thereof; and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit: (except changes as to dates of payments):

“The County of Maricopa, State of Arizona, hereby promises to pay to the holder hereof on the 15th. day of January, 19....., at the office of the County Treasurer of the County of Maricopa, State of Arizona, Thirty Dollars (\$30.00) in gold coin of the United States, for the semi-annual interest on its highway bond numbered.....

Election of December 31st, 1920.

Chairman of the Board of Supervisors of Maricopa County, State of Arizona.

Attest:

Clerk of the Board of Supervisors of Maricopa County, State of Arizona.

\$30.00

Coupon Number.....”

XXI.

That no recital in said bonds or coupons or any statement therein contained gave any indication whatsoever that said bonds or any of them were subject to call for redemption before their maturity dates nor did any recital or statement in said bonds or coupons call attention to any statute, law, practice or custom providing for the call of said bonds for [65] redemption before their respective due dates and no such statute, law, practice or custom ever existed or was suggested in the State of Arizona prior to the attempt to call such bonds for redemption in the year 1942.

XXII.

That thereafter said Board of Supervisors caused to be published a notice inviting proposals for the purchase of said bonds and said notice contained the following provision:

“Said bonds to be serial bonds, part of which will mature on the 15th day of January of each year from the year 1931 to the year 1951, both inclusive, as more specifically prescribed in that certificate of the Board of Supervisors relating to the said bonds, recorded in the office of the County Recorder of said Maricopa County on November 8, 1921, in Book 24, page 345 of Miscellaneous Records”;

That the certificate referred to was so recorded in the County Recorder's office and gave the dates of the maturity of said bonds as set forth in the order for said bonds hereinbefore set forth.

XXIII.

That bids for said bonds were received and the bid of Harris Trust & Savings Bank, William R. Compton Company, Northern Trust Company, Union Trust Company, and Bankers Trust Company, of Denver, was accepted. Said bid was made for the bonds containing the terms of the bonds as set forth in the form attached hereto, marked "Exhibit B", and for the maturities set forth in the proceedings of said Board of Supervisors for the issuance of said bonds as hereinabove set forth, and the amount of said bid was Four Million Eight Hundred Thousand, One Hundred Fifty (\$4,800,150.00) Dollars, cash, for the four million five hundred thousand (\$4,500,000.00) Dollars of bonds.

XXIV.

That after the election of the property taxpayers approv- [66] ing issuance of said Four Million Five Hundred Thousand (\$4,500,000.00) Dollars of bonds, and after the canvass of the results of said election, and after the determination of the maturities of said bonds as set forth in the order for election, and the call for said election, and as approved by the property taxpayers at said election and prior to the notice inviting proposals for the sale of said bonds, the legislature of the State of Arizona passed Chapter 86 of the Session Laws of 1921 ratifying, approving and validating the said bonds as authorized, to be issued and sold by the Board of Supervisors of said county at an election by the property

taxpayers of said county held December 31, 1920, and that in and by said act the legislature of the State of Arizona declared that the said election "was a valid election and conferred upon the Board of Supervisors of said county the power and authority to issue and sell said bonds and that said bonds when issued and sold by said Board of Supervisors are hereby declared to be free from any defect or invalidity by reason of any act or omission of said Board of Supervisors in calling and holding said election or preparatory thereto"; that said act of the legislature became a law on or about June 14, 1921, and before said bonds were offered for sale.

XXV.

That after said bonds were delivered to the said original purchasers thereof as hereinabove set forth they entered upon the market as negotiable securities and were sold on the open market to various purchasers and the bonds of said issue hereinbefore described as now owned and held by the plaintiffs were purchased by said plaintiffs in reliance upon the said proceedings of the Board of Supervisors fixing definite maturity dates for said bonds and providing for the payment of interest [67] at the rate specified in said bonds until the due dates thereof and in reliance on the act of the legislature of the State of Arizona above set forth, ratifying and approving said bonds and declaring the same free from any defect, and that by reason of reliance of the plaintiffs upon said provisions in said proceedings of the public records of said Mari-

copa County, and the act of the legislature of the State of Arizona approving and ratifying said bonds, each of the plaintiffs paid a large premium for the right to collect interest on said bonds at the rate specified therein until the respective maturity dates specified in said bonds.

XXVI.

That after the issuance and delivery of said last issue of bonds in the year 1921, defendant, Maricopa County, regularly levied and collected taxes for each of the issues of bonds above set forth and made the semi-annual payments of interest out of the interest fund and retired those bonds that became due and payable on their respective due dates and at no time made any claim or assertion of any right to retire any of said bonds before their due dates until the year 1942; that in the year 1942 the Board of Supervisors of said Maricopa County adopted a resolution demanding that the State Loan Commissioners of the State of Arizona issue refunding bonds for the purpose of redeeming and refunding all of the bonds of the two issues above mentioned, including all bonds above described as owned and held by the plaintiffs, notwithstanding the fact that said bonds were not yet due and payable and contained no provisions for retirement or redemption thereof before their respective due dates; that said Loan Commissioners of the State of Arizona refused to take any proceedings for such refunding, and, thereupon, the said Board of

Supervisors of Maricopa County, Arizona, [68] brought a mandamus proceeding in the Supreme Court of the State of Arizona to compel the State Loan Commissioners to refund and redeem said bonds under the provisions of Article 4 of Title 10, of Arizona Code Annotated, 1939, Sections 10-401 to 10-411; that in said mandamus proceedings to which neither of the plaintiffs nor any of the holders of bonds of either of the issues hereinabove described were parties, the Supreme Court of Arizona ordered the said Loan Commissioners to proceed with said refunding of said bonds and in said opinion stated that said Article 4 of Title 10, Arizona Code Annotated, 1939, was applicable to the redemption and refunding of the issues of bonds of which the bonds herein described as held by the plaintiffs are a part; that thereafter, the said Board of Supervisors again demanded that the said Loan Commissioners proceed with the refunding of said bonds and that said Loan Commissioners thereupon adopted a resolution calling for bids for bonds to refund the whole remainder of the two issues hereinabove described remaining outstanding, including all of the bonds owned and held by the plaintiffs as hereinabove set forth; that in response to said call for bids only one bid was received and that said Loan Commissioners, with the approval of said defendant, Maricopa County, accepted said bid and that thereupon the said bidder requested a further proceeding in the Supreme Court of Arizona to establish the legal validity of the said refunding bonds and to determine what notice must be given to call

the outstanding bonds and stop the payment of interest thereon. Thereupon the said Loan Commissioners, with the approval of said Board of Supervisors of Maricopa County, refused to issue said bonds to the purchasers upon the ground that the legality of the same was doubtful, and upon the further ground that the bonds to be refunded were not subject to call [69] for redemption before their respective due dates and that the same were not due; that thereupon, said Maricopa County brought a further mandamus proceeding in the Supreme Court of the State of Arizona to compel the State Loan Commissioners to issue and deliver said refunding bonds. That said Maricopa County was the sole plaintiff, and Sidney P. Osborn, as Governor, Ana Frohmiller, as State Auditor, and J. D. Brush, as State Treasurer of the State of Arizona, constituting the Loan Commissioners of the State of Arizona, were the only defendants, and that said suit was filed by said Maricopa County at the request of the bidders for said bonds, and under the direction of the attorneys of the bidders, and the purpose and object of said suit was not to grant a hearing upon or consideration of the rights of the holders of the bonds proposed to be refunded, but was to obtain a declaration from the Supreme Court of the State of Arizona as to the validity of the refunding bonds proposed to be purchased by the bidders, and that the questions submitted for consideration to the said court for determination by the defendants were limited to the following:

- (1) That no benefit or profit would result to

the county from the issuance of the refunding bonds by reason of the fact that the outstanding bonds were not callable, and payment of the interest thereon would not cease until they became due according to their terms.

(2) That there was no form or method of notice provided for calling the outstanding bonds.

(3) That the maturities of the new bonds proposed to be issued were not in accordance with the statute providing for the issuance thereof.

(4) That no authority existed in the statute for the levy of sufficient taxes to retire the proposed new bonds ac- [70] cording to their terms.

(5) That the new refunding bonds would be subject to refunding the day after their issuance, and

(6) That the law required the manual and personal signature of the Treasurer to all the coupons, and this was not practicable, and there was no authority in the act for affixing the facsimile signature of the Treasurer.

That the question of the callability of the outstanding bonds was submitted to said court wholly upon the decision of said court in the prior mandamus suit, and no reconsideration of said prior decision was made or requested, and that there was not submitted to said Supreme Court of the State of Arizona, and never has been submitted to said court the fact that said Chapter I, Title 52, Revised Statutes of 1913, was a reenactment of the old territorial statute, and therefore, limited in its effect to the interpretation placed upon said statute by the territorial courts, nor were there submitted

to said court the facts hereinafter set forth showing that said Revised Statutes of 1913 were a compiled, and not a revised code, and that Chapter II, Title 52, Revised Statutes of 1913 was a later enactment than Chapter I, Title 52, nor was there called to the attention of said court Section 5553, Revised Statutes of 1913, providing that a subsequent statute repeals a prior statute upon the same subject. Nor was it called to the attention of said court that said Chapter I, Title 52, Revised Statutes of 1913, made county, municipal and school district bonds, if refunded by the State Loan Commissioners, obligations of the state in violation of the constitutional provision limiting indebtedness of the state. Nor was it called to the attention of said court that subsequent acts of the legislature indicated a policy of limiting refunding to optional bonds. Nor was the fact that Article IV, [71] Chapter 60, of the Revised Code of 1928, was a new enactment and made a material change in the law with reference to the questions above mentioned, called to the attention of said court.

XXVII.

That notwithstanding the fact that the bid for the bonds proposed to be issued by the State Loan Commissioners for the refunding bonds of the plaintiff, and other bonds of said issues outstanding, is practically par for a $2\frac{3}{4}\%$ interest rate, the actual difference between the rates of 6% and $5\frac{1}{2}\%$ carried by the bonds of the plaintiffs which are sought to be redeemed, and the current rate of like bonds is much greater, the current rate of interest on such

bonds being approximately 2¼%. The difference in said rate and the rate at which the proposed bonds were awarded to the bidder being due to the fact that there was only one bid other prospective bond purchasers having refrained from bidding because of the doubt as to the validity of said refunding bonds arising from the fact that if the bonds proposed to be redeemed remain outstanding the new issue of bonds will create a new indebtedness of the county without the vote of the real property taxpayers, in violation of the constitution and statutes of the state of Arizona. That the said refunding proceedings hereinabove mentioned proposed by the State Loan Commissioners at the demand of the Board of Supervisors of Maricopa County, is a plan or device to obtain the redemption of the outstanding issues of bonds held by the plaintiffs and other like bondholders, and to deprive said bondholders of the rate of interest which the county has agreed to pay, and thereby effect a saving to said county at the expense of said bondholders; that none of the parties to said mandamus proceedings were interested in defending the holders of said outstanding bonds, and that [72] neither of the said mandamus proceedings in the Supreme Court of Arizona hereinabove mentioned has been adequately or properly defended in said court, as all parties to said proceedings were desirous of causing the refunding and redemption of the bonds of the outstanding issues, including the bonds held by the plaintiffs. That most of the facts and law upon which the rights of the plaintiffs in this suit

are based, have not been presented to said Supreme Court of Arizona in either of the mandamus proceedings herein mentioned.

XXVIII.

That the defendants have entered into a contract with the bidders for said proposed refunding bonds, granting to said bidders the right to accept said refunding bonds at the price stated in their said bid whenever they elect so to do. And said bidders will accept and pay for said refunding bonds as soon as said bonds are ready for delivery, and the attorneys for said bidders will render their approving opinion.

XXIX.

That if the outstanding bonds of the plaintiff are permitted to be called and the payment of interest thereon to be terminated as of the present date, the loss to each of the plaintiffs caused by such redemption will greatly exceed the sum or value of Three Thousand (\$3,000.00) Dollars.

XXX.

That the said bonds owned by the plaintiffs are proposed to be refunded by the defendants by virtue of the provisions of Article IV of Chapter 10, of the Arizona Annotated Code, 1939. That said Article IV, Chapter 10 first became a law of the state of Arizona as a new enactment, and not as a re-enactment or revision of an existing statute, as Article IV of Chapter 60, of Arizona Revised Code of 1928, on the first [73] day of July, 1929,

some seven or eight years after the issuance of plaintiffs' bonds. That said statute is the only authority existing in the law of Arizona authorizing the refunding of county indebtedness by the State Loan Commissioners. That Section 2654 of said Article IV, Chapter 60, Revised Code of Arizona, 1928, reads as follows:

"Sec. 2654. County or municipal bonds by state loan commissioners. The boards of supervisors of the counties and the municipal and school authorities, shall report to the state loan commissioners the bonded and outstanding indebtedness of the county, municipality or school district, and, upon the demand of said authorities, the commissioners shall provide for the redeeming or refunding of such indebtedness in the same manner as other state indebtedness, and issue bonds of the state for any indebtedness allowed by law to be incurred by such county, municipality or school district. Such bonds shall be issued upon the faith and credit of the state only to the extent that it will cause to be levied and collected taxes for the payment of the principal and interest for such bonds, and pay the same when such bonds have been issued. The county, municipality, or school district shall pay into the state treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the state board of equalization, or on their failure by the state auditor, to be levied for the payment of the principal and interest of such bonds issued for such county, municipality, or school district, in the same manner as it herein provided for the pay-

ment of the principal and interest of state indebtedness.”

That the above section provides that the Loan Commissioners upon demand of the Board of Supervisors, “shall provide for the redeeming or refunding of such indebtedness in the same manner as other state indebtedness and issue bonds of the state for any indebtedness allowed by law to be incurred by such county, municipality or school district”. The provision for refunding of state indebtedness referred to in said section is found in Section 2646 of said Article IV, which provides that the Loan Commissioners “shall provide for the payment of the state indebtedness due and to become due, now existing or [74] hereafter authorized for the purpose of paying, redeeming and refunding all or any part of the principal and interest of the same from time to time, issue negotiable coupon bonds of the state when they can be issued at a lower rate of interest than previously paid, or when to the profit and benefit of the state”; that the defendant, Maricopa County, contends that the bonds of the plaintiff and other like bonds may be redeemed and refunded under the provisions of Sections 2654 and 2646, without impairing the obligation of any contract between said Maricopa County and the holders of said bonds, for the reason that a similar right for the redemption and refunding of said bonds existed at the time of the issuance of said bonds under the provisions of Chapter I of Title 52, Sections 5251 and 5265 of Revised Statutes of Arizona, 1913, which were in force when said

bonds of the plaintiffs were issued; that said contention of defendant, Maricopa County, is not well founded for the following reasons:

1. If there existed any right to redeem either of the bond issues above mentioned by virtue of any statute or law in force when said bonds were issued such right of redemption was excluded from application to said bond issues and each of them by the Acts of the legislature, (Chapters 54 and 86, Session Laws of 1921) approving and ratifying said bonds after the form of the bonds had been adopted and the covenants therein to pay the interests to definite maturity dates had become effective and made a matter of public record.

2. Chapter I of Title 52, Arizona Revised Statutes of 1913, in so far as is material in this connection, was a re-enactment of Chapter 29 of Arizona Session Laws of 1912, First Special Session, and said Chapter 29 of Arizona Session Laws of 1912, First Special Session, was a reenactment of the Act [75] of Congress of June 25, 1890, Chapter 614, 51st Congress, First Session, as amended by the Act of Congress of August 3, 1894, Chapter 200, 53rd Congress, Second Session and further amended by Act of Congress of June 6, 1896, 29 Stat. 262, and that under the first of the above mentioned acts the refunding of county indebtedness was limited to indebtedness incurred prior to December 31st, 1890, subject to the provision that said indebtedness might be validated or allowed after said date and that by the second of the above mentioned acts the county indebtedness permitted to be refunded was

extended to include all indebtedness incurred prior to December 31, 1895, and that by the third of the above mentioned acts the final limit of county indebtedness to be refunded was extended to the first day of January, 1897, and that after said date no refunding of county indebtedness could be made under either of said acts, and that said acts by virtue of the constitution of Arizona became the law of the State of Arizona upon said Territory of Arizona becoming a state and was reenacted without change in this respect by Chapter 29 of the Session Laws of 1912, First Special Session, that one of the sections of said Chapter 29 was amended and a new section was added to said act by Chapter 2 of the Second Special Session of said legislature, and Chapter 50 of the Second Special Session of said legislature, but said Chapter I, Title 52, was never reenacted by said legislature, nor was any change or modification therein made, or any action taken with respect thereto by the Third Special Session of the First Legislature of the State of Arizona, and any provision therein which might be construed as authorizing the redemption or refunding of bonds of the issues owned and held by the plaintiff in this case was repealed by the enactment of Chapter 20, Laws of 1913, Third Special Session, hereinafter mentioned. [76]

3. That the bonds owned and held by the plaintiffs in this case were issued under the provisions of Chapter II, Title 52, Arizona Revised Code of 1913, being Sections 5266-5285, of said statutes. That said chapter was originally enacted as Chapter

29, Session Laws of 1912, Regular Session, but was reenacted in its entirety with certain additions thereto, as Chapter 20, Laws of 1913, Third Special Session, and that said Chapter 20, Laws of 1913, Third Special Session, as shown by the original Act on file in the office of the Secretary of State of the State of Arizona, contained a section numbered 20, expressly repealing all acts or parts of acts inconsistent with the provisions of said act. That said repealing section is not set forth in the Arizona Revised Statutes of 1913, and was not called to the attention of the Supreme Court of Arizona in either of the mandamus suits. That said Chapter 20, Laws of 1913, Third Special Session, with the exception of the said repealing section, is contained in the Revised Statutes of 1913, as Chapter II, Title 52. That said Act prescribes a complete procedure for the issuance, sale and redemption of county and municipal bonds. That Section 5273 of said Chapter expressly provides that the order for election shall fix and state the date of maturity of said bonds. That Section 5274 expressly provides that said bonds shall be payable at a date not to exceed forty years from the date of their issuance. Section 5278 of said Chapter expressly provides that the interest on said bonds shall be paid out of the tax levy provided for that purpose, until said bonds are redeemed. Section 5279 of said Chapter expressly provides a sinking fund to be created for the redemption of said bonds when the same shall mature. Section 5281 of said Chapter expressly provides that said bonds shall

be called when they mature by notice for four [77] weeks in some newspaper published in the county in which such bonds have been issued, and that all of the aforesaid provisions are inconsistent with the interpretation of the provisions in Chapter I of the same title under which defendants claim the right to redeem said bonds before maturity. That said Chapters I and II, Title 52, Revised Statutes of 1913, being set forth as a part of said statutes, appear to be part of a revised code without reference to the dates of their enactment. But that said Revised Statutes of 1913 did not constitute a revised code, but were compiled laws, compiled by the then Code Commissioner of the State of Arizona, pursuant to the provisions of Chapter 64 of the Acts of the Third Special Session of the First Legislature, which is not in said Revised Statutes, but is on file in the Secretary of State's office, and is published in a statute book containing temporary and special statutes, passed by the Third Special Session of the First Legislature. Said Chapter 64 is entitled:

“An Act to Provide for the Arrangement, Compilation and Indexing of the Laws of the State of Arizona, and the Publication Thereof, and to Extend the Term of Office of the Present Code Commissioner and to Define His Powers and Duties, and Making an Appropriation for His Compensation, and the Compensation of Stenographers to Be Employed by Him”.

Section 2 of said Act provides in part as follows:

“It shall be the duty of the said Code Commissioner to compile, arrange under proper heading and sections and chapters, all laws of a general nature which shall be in force after the adjournment of the third special session of the first legislature of the state of Arizona, or to take effect thereafter, and not repealed or adjudged unconstitutional by the Supreme Court of Arizona, with authority to arrange said laws into titles and chapters”.

And Section 7 of said Act reads:

“Nothing in this act shall be construed as giving said Code Commissioner any power to change or modify or make any law or laws, but [78] only as giving him full power and authority to complete full compilation and arrangement for publication of the laws of the state”.

That it clearly appears from the foregoing that Chapter I, Title 52, Revised Statutes of 1913, was inserted in said Revised Statutes by the Code Commissioner as a statute existing at the time of said compilation, and that said Chapter I, Title 52, must be given the status and interpretation that it had prior to said compilation, which is that it was an enactment prior to Chapter II, Title 52, Revised Statutes of 1913, and any provision therein inconsistent with Chapter II of Title 52, a later enactment, was repealed thereby.

That with the exception of the years 1901 to 1907, it has been a rule of statutory construction

of the State of Arizona by express provision of statute that a prior statute upon the same subject as a later statute does not continue or remain in force after the enactment of the later statute though it is consistent therewith.

Chapter 5 of Title 60 of the Revised Statutes of 1887 was omitted in the 1901 Revised Statutes, but was reenacted by Chapter 10, Session Laws of 1907, and became the law of the State of Arizona upon statehood by virtue of Section 2, Article XXII of the Arizona Constitution, and was reenacted by the First State Legislature as Chapter 19, of the Third Special Session, just prior to the enactment of Chapter 20 of the said Third Special Session, which was inserted in the Revised Statutes of 1913 as Chapter II of Title 52. Section 6 of said statute reads as follows:

“Sec. 6. When a statute has been enacted by the legislative power of the territory and has become a law no other statute, law or rule is continued in force because it is consistent with the provisions of such statute passed subsequently thereto, but in all cases provided for by such subsequent statute, all statutes, [79] laws and rules theretofore in force in this territory, whether consistent or not with the provisions of such subsequent statutes unless expressly contained in force by it shall be repealed and abrogated.”

That Chapter 20 of the Session Laws of 1913, Third Special Session, which is found in the 1913

Revised Statutes as Chapter II, Title 52, expressly included the redemption of the bonds authorized to be issued by said Chapter, as is shown by the title thereof, which expressly includes the subject of redemption of said bonds, and by the provision in Section 14 thereof providing that said bonds may be redeemed after their maturity.

4. That the provision in Section 5260, in Chapter I of Title 52, Revised Statutes of 1913, provided for funding and refunding, which defendants claim authorized the refunding of the bonds owned by the plaintiffs at the time when the same were issued by defendant, Maricopa County, was adopted, together with other provisions for refunding as a part of the reenactment of the Act of Congress of June 25, 1890, Chapter 614, 51st Congress, First Session, which was a part of the law of the Territory of Arizona before it became a state, and which by virtue of Section 2, Article XXII of the Constitution of Arizona became a law of the State of Arizona insofar as the same was not inconsistent with the Constitution of Arizona, but any provision inconsistent with said Constitution did not become a law of said state; that said provision as it existed in said Act of Congress, June 25, 1890, made all indebtedness refunded under said provision indebtedness of the Territory of Arizona and expressly obligated the Territory of Arizona to pay said bonds even though it did not collect the necessary taxes from the county to pay the same, (Par. 2047, p. 106, Ariz. Rev. Stat. 1901), and further expressly obligated the [80] Territory to pay the in-

terest on said bonds out of the special fund collected from the county for the purpose, and if said fund was not sufficient then to pay the same out of the general fund of said Territory, (Par. 2050, p. 109, Ariz. Rev. Stat. 1901). By Section 2 of Article XXII, Constitution of Arizona, when Arizona became a state the word, "state" was substituted for the word, "territory", so that said obligation to pay said bonds was imposed upon the State of Arizona, but that said provision was in conflict with Section 5 of Article IX of the State Constitution, which limited the indebtedness of the state to \$350,000.00 and expressly prohibited the creation of any indebtedness by the state for the purpose contemplated by said provision, and that said provision of Section 5260, Revised Code of 1913, until given the interpretation claimed by defendants, was likewise in violation of said section of the Constitution of Arizona, and, therefore, of no force or effect whatever; that for the reasons aforesaid, no bonds refunding county bonds could have been issued under Chapter I, Title 52, Revised Statutes, 1913, or any other law of the State of Arizona prior to the enactment of Article IV, Chapter 60, of the 1928 Revised Code of Arizona, in which it was provided that the state should not be liable for county bonds refunded by the State Loan Commissioners.

5. That the provision in Section 5260, of Chapter I, Title 52, Revised Code, 1913, under which defendants claim the right to refund and redeem the bonds owned by the plaintiffs, authorizes the

redeeming or refunding of county, municipal or school district indebtedness now allowed or that may be hereafter allowed by law to said county, municipal or school district upon official demand by said authorities. The expression "indebtedness now allowed or that may be hereafter allowed by [81] law", had its origin in a rider added by Congress to a territorial funding and refunding act by the Act of Congress of June 25, 1890, and that said language did not refer to indebtedness thereafter to be created but referred only to indebtedness then existing, which might thereafter be validated by act of the Territorial Legislature and that said language was so clearly understood and interpreted by the officials of the territory and by the legislature of the state of Arizona, and by Congress, and by the courts of said territory, and that such interpretation was frequently evidenced by acts of the legislature of the territory and that said expression continued to receive such interpretation by the public officials, the legislature, and the courts of the state of Arizona, until such expression was changed by the Code Commissioner in the Revised Code of 1928, in which code said expression was changed to, "indebtedness now allowed or hereafter allowed to be incurred by law", and other changes were made in said Chapter I, Title 52, Revised Statutes of 1913, which became Article IV of Chapter 60, of the Revised Code of 1928, for the purpose of making effective the provision for the refunding of county, municipal and school district indebtedness by the Code Commissioner of the state, and

authorizing the issuance of bonds by the Loan Commissioners on behalf of the counties, municipalities and school districts of the state as purely municipal obligations with only the issuance of said bonds and the levy and collection of taxes therefor being vested in the Loan Commissioners.

XXXI.

That the Arizona Revised Code of 1928 became effective on July 1, 1929, several years after the bonds owned by the plaintiffs in this case were issued by the defendant, Maricopa County; that each of the chapters of said Revised Code of 1928 [82] were first enacted as a separate enactment and after the same had all been separately enacted, the entire code was enacted by the legislature as one entire and complete act, under a general title appropriate for the purpose, and such enactment was held valid and effective by the Supreme Court of the state and it was further held by said Supreme Court that the effect of such enactment was to make each section of said Revised Code of 1928 a new enactment and of equal validity with every other section thereof, and to require each section of said code to be construed as if the same were a new and separate enactment, independent of every other section thereof and that the effect of such construction was to make Article IV of Chapter 60 of said Revised Code of 1928, which was formerly Chapter I, of Title 52, Revised Statutes of 1913, an independent enactment of equal validity with Article V of said Chapter 60, Revised Code of 1928, which

was formerly Chapter II, of Title 52, Revised Statutes of 1913, and that the other changes made in the former Chapter I, Title 52, Revised Code of 1913, had the effect of authorizing state, county and municipal bonds to be refunded by the Loan Commissioners of the State of Arizona in the manner and with the effect asserted by the defendants in this case, with the exceptions, (1) that said act did not provide for the calling of any of the bonds proposed to be refunded before their maturity dates, and (2) that said act made no provision for giving notice for the calling of said bonds, the old territorial provision for calling territorial warrants never having any application to calling in bonds or warrants before their due dates, and no provision having ever been made for calling state warrants. The Supreme Court of the State of Arizona in the two mandamus suits above mentioned supplied the two omissions necessary for calling of outstanding bonds, [83] which were not provided by said Article IV, Chapter 60, Revised Statutes of 1928, by holding that the provisions in said Section authorized the refunding of state bonds whenever such refunding should be to the benefit and advantage of the state, and the provision that county, municipal and school district bonds might be refunded in the same manner as state bonds authorized the calling of outstanding county bonds whenever the refunding of such bonds would effect a saving and advantage to the county, and by further holding that said Article IV, Chapter 60, Revised Code of

1928, was a reenactment of the Act of Congress of June 25, 1890, and that said Act of Congress adopted as the notice to be given for calling said bonds, a notice prescribed by the then existing statute of the territory for calling past due territorial warrants, and that such adoption of the old territorial statute for the calling of past due territorial warrants remained in force for the purpose of giving notice for calling outstanding bonds such as are owned by the plaintiffs by reason of having been incorporated into the original act of Congress which by successive reenactments became a part of the existing statutes of the state, notwithstanding the fact that the same had long since been repealed; that the result of said decisions of the Supreme Court of the State of Arizona is to provide the machinery for calling the bonds owned by plaintiffs in this case through Article IV, Chapter 60, Revised Code of 1928, and making of that statute a law impairing the obligation of the contract created by the issuance of said bonds of the plaintiffs.

XXXII.

That under the Constitution of Arizona, counties are bodies politic and corporate, and under said Constitution and laws of the state, the Boards of Supervisors are vested with [84] the power of legislating for their respective counties, and under the provisions of Article 4 of Chapter 10, of the Arizona Annotated Code of 1939, formerly Article 4 of Chapter 60, Arizona Revised Code of 1928, as construed by the Supreme Court of Arizona in,

Maricopa County v. Osborn, 125 Pac. (2d) 703, said Boards of Supervisors and the Loan Commissioners of the state are granted the legislative power of calling for payment, outstanding bonds of the county and terminating the agreement of the county to pay interest on said bonds before the due dates specified in said bonds. That both the Board of Supervisors of Maricopa County and the State Loan Commissioners have undertaken to exercise the power to call for payment, and stop payment of interest on, the bonds of plaintiffs before their due dates by each passing resolutions directing that the money received from the sale of the refunding bonds shall be paid to the State Treasurer and that said Maricopa County shall pay the interest to date remaining unpaid on said bonds to the State Treasurer, and finding that when the aforesaid moneys are paid to the State Treasurer there will be in the State treasury sufficient money to pay all principal and interest of all outstanding bonds of said issues, and directing said State Treasurer, as soon as said moneys are in the treasury, to publish a notice calling said bonds for redemption, and providing that the payment of interest on said bonds shall cease at the time specified in said notice. That the form of said notice and the time and manner of the publication of said notice are specified in said resolutions. That the provisions in said resolutions calling said bonds for payment and stopping payment of interest thereon before their due dates, are in violation of the contracts of said Maricopa

County to pay interest on said bonds until the due dates thereof made by said Maricopa County when said bonds were issued, and [85] said resolutions of said Board of Supervisors and said State Loan Commissioners are laws impairing the obligation of the aforesaid contracts of Maricopa County within the meaning and intent of Section 10 of Article I of the Constitution of the United States.

XXXIII.

That if the provisions of Section 5260 Revised Statutes of 1913 were ever susceptible of an interpretation permitting the call for redemption of bonds issued under Chapter II, Title 52, Revised Statutes of 1913, before their maturity such interpretation is conclusively precluded by the several refunding acts passed by the legislature of the state of Arizona subsequent to the issuance of the bonds owned and held by the plaintiffs in this case, and, particularly, by Chapter 39 of the Sessions Laws of 1927, which authorized county, municipal and school district bonds to be refunded only when they had "become payable at the option of such county, school district or municipality", and by Chapters 74 and 75 of the Session Laws of 1935, which authorized state and territorial bonds to be refunded by the Loan Commissioners only after they had become optional; that said acts of the legislature of the state of Arizona are a declaration of the policy of the state of Arizona to the effect that unmatured bonds are not redeemable, which is binding upon the defendants.

XXXIV.

That the attempt of the defendants to deprive the plaintiffs of the right to collect the rate of interest specified in the bonds held by them for the remainder of the term of said bonds is an unlawful attempt to deprive the plaintiffs of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United [86] States; that the alleged right to call said bonds under the provisions of Article IV, of Chapter 10, of the Arizona Annotated Code of 1939, is contrary to the recognized interpretation of said statute from the time of its origin in the Act of Congress of June 25, 1890, Chapter 614, 51st Congress, First Session; that said Act of Congress applied only to indebtedness existing at the date of said enactment which had been allowed or validated or might be allowed or validated after the passage of said Act, the time for the allowance and validation of said indebtedness being extended by Act of Congress of August 3, 1894, Chapter 200, 54th Congress, Second Session, and further extended by Act of Congress of June 6, 1896, 29 Stat. 262, the last extension limiting the indebtedness to be refunded thereunder to the first day of January, 1897; that said acts were interpreted by several decisions of the Supreme Court of the Territory of Arizona and the Supreme Court of the United States; and that under said decisions there could be no refunding under said act of county indebtedness incurred after January 1, 1897; that the provisions of said Act of Congress of June

25, 1890 were incorporated without change in the statutes adopted by the first legislature of the state of Arizona, and inserted in Chapter I, Title 52, of the Revised Statutes of 1913, and from the date of statehood in Arizona in 1912, to July 1, 1929, when the Revised Code of 1928 became effective, bonds issued in pursuance of Chapter I, Title 52, Revised Statutes of 1913, clearly became direct obligations of the state of Arizona and could not be issued because prohibited by Section V of Article 9 of the State Constitution; that the bonds of plaintiffs which defendants seek to refund in this case were issued under Chapter II, Title 52, Revised Statutes of 1913, which contains provisions prescribing a complete pro- [87] cedure for the issuance of such bonds and provisions expressly requiring said bonds to be issued with definite maturity dates, and the interest to be paid until such maturity dates, a sinking fund to be created for the payment of the bonds at maturity, and for redemption of the bonds only after maturity: that the said provisions of Chapter II, Title 52, are wholly inconsistent with any right to call bonds issued under said Chapter II that may be implied from Chapter I of said Title 52, and said Chapter I becoming a statute of the state upon statehood, and said Chapter II being enacted by the legislature at a later date than said Chapter I, and containing an express repeal provision, necessarily prevails over Section i; that said Chapter II, Title 52, Revised Statutes of 1913, both in the title under which it was enacted and in the body thereof, con-

tained a provision for the redemption of said bonds; that such provision was limited to their redemption after their maturity dates and, therefore, prevailed over any provisions for redemption that might be contained in any statutes enacted prior to the date of the enactment of said Chapter II, Title 52; that Chapter 19 of the Laws of 1913, Third Special Session, inserted in the Revised Statutes of 1913 as Title 58, was in effect when Chapter 20, Laws of 1913, Third Special Session, inserted in the Revised Statutes of 1913, as Chapter II, Title 52, was enacted, and expressly provided that when any act enacted by the legislative power of the state became a law no other statute, law or rule was continued in force because consistent with the provisions of such later enactment, but unless expressly continued in force by such later enactment it should be repealed and abrogated. The bonds owned and held by the plaintiffs were expressly ratified, approved and declared free from defects in the form in which they were issued by the legislature [88] of the State of Arizona before they were purchased by plaintiffs, who paid a premium therefor in reliance upon the express provisions of the statutes of the state, including such ratifying acts, that at no time from statehood in the year 1912 until the year 1942, was there any suggestion by any public official of the county of Maricopa of the State of Arizona that such bonds were callable for redemption before their maturity dates; that defendant, Maricopa County received and beneficially expended for the purpose for which said bonds were voted, the money

paid by the purchasers of said bonds upon the representation that said bonds would continue to bear the rate of interest therein specified until their due dates and now seeks to call said bonds for redemption in order that it may receive the benefit of the lower interest rates now existing; that the plaintiffs and each of them paid a large premium for the bonds purchased by them in good faith, relying upon the public acts of the Board of Supervisors of Maricopa County as the same appeared of record and upon the acts of the legislature of the State of Arizona, duly enacted, that to deprive them of the right, under the circumstances stated, to receive the specified rate of interest on said bonds for which they paid a large premium, is to deprive them of their property without due process of law.

XXXV.

Plaintiffs allege that the facts herein set forth and, particularly, the fact that the legislature of the state of Arizona, approved and ratified the bonds to encourage their sale, and the further fact that the state of Arizona itself purchased a considerable number of said bonds, paying a premium therefor upon the theory that they were not redeemable before maturity and the fact that defendant, Maricopa County, received a price [89] for said bonds based upon said bonds not being redeemable until their maturity and used the money received from the sale of the bonds for the purpose for which said bonds were issued, and the payment by the plaintiffs of substantial premiums

in reliance upon such representations by the defendants, estop the defendants from now asserting any right to redeem said bonds contrary to the express terms of said bonds, and that to permit the defendant, Maricopa County, to redeem such bonds, as it seeks to do, will operate as a fraud on plaintiffs.

XXXVI.

That the decisions of the Supreme Court of the state of Arizona made in the two mandamus suits hereinabove referred to, are not binding upon the Federal Courts for the following reasons:

1. That the interests of the bondholders holding any of said bonds were not represented before the court in either of said mandamus proceedings.

2. That the rights of the bondholders could not be litigated in such proceedings for the reason that under Section IV, of Article 6, of the State Constitution, the Supreme Court of Arizona has only limited jurisdiction in original mandamus proceedings against state officers.

3. That the greater part of the issues of fact and law presented in this complaint do not appear to have been presented to the Supreme Court of the State of Arizona in either of said mandamus proceedings, and said Superior Court has not passed upon said issues.

4. That the decision of the Supreme Court in said mandamus proceedings is not binding upon the Federal Courts, first, because the jurisdiction of said courts in this case is based upon federal questions, second, questions of existing [90] state

law are not seriously involved, third, the law to be interpreted was originally enacted by Congress, fourth, the case presents questions of estoppel against the state, and fifth, the State of Washington, as a sovereign state, is entitled to an independent determination by the Federal Courts.

XXXVII.

That this action is brought under the provisions of the Declaration Judgment Act, being 28 United States Code Annotated, Section 400; that it is evident from the allegations herein made that the defendants are proceeding to violate the plaintiffs' rights in the respects herein alleged, and that the plaintiffs have the right under said Act to resort to the federal courts for a determination of their rights without waiting the withholding of the interest on their bonds, which the defendants have clearly and plainly declared their intention to withhold.

Wherefore, plaintiffs pray that an adjudication may be made of their rights under the bonds which they severally hold, that it be declared that they and each of them are entitled to be paid the rate of interest specified in said bonds until the respective due dates of said bonds; and that in the event said defendants should refuse to make such payments, plaintiffs be awarded such further relief as the court may deem proper, and their costs.

SMITH TROY,

Attorney General, of the
State of Washington,

By JOHN SPILLER

Assistant Attorney General
GUST, ROSENFELD, DIVEL-
BESS, ROBINETTE AND
COOLIDGE,

201-11 Professional Building,
Phoenix, Arizona,

By JOHN L. GUST

Attorneys for Equitable Life
Insurance Company of
Iowa. [91]

EXHIBIT A

\$1000.00

UNITED STATES OF AMERICA
STATE OF ARIZONA

County of Maricopa
Highway Bond

Election of May 17, 1919

No.....

No.....

The County of Maricopa, State of Arizona, for value received, hereby acknowledges itself indebted and promises to pay to the bearer hereof, on the 15th day of June, A. D. 19...., the sum of One Thousand Dollars (\$1000.00) in gold coin of the United States, with interest hereon from date hereof in like gold coin at the rate of five and one-half per centum per annum, payable semi-annually

on the 15th day of June and the 15th day of December of each year, on presentation and surrender of the interest coupons hereto attached. Both principal and interest aforesaid shall be payable at the office of the Treasurer of the County of Maricopa, State of Arizona.

This bond is one of a series of four thousand bonds of the same date and tenor, except as to maturity, numbered respectively from 1 to 4,000, inclusive, and amounting to the aggregate of four million dollars (\$4,000.00)

This bond is issued by the Board of Supervisors of said County of Maricopa, for the purpose of constructing and improving public highways within and for the said County of Maricopa, pursuant to and in strict compliance with the Constitution of the State of Arizona, and the statutes thereof, including among others Chapter II of Title LII of the Revised Statutes of Arizona, 1913, Civil Code, and Chapter 31 of the Session Laws, Regular Session, 1917, and acts amendatory thereof and supplementary thereto, and in pursuance of a resolution of said Board of Supervisors duly adopted on the 31st day of March, 1919, and the report duly made by the Highway Commission for said county of Maricopa to said Board of Supervisors on the 10th day of April, 1919, and a resolution by said Board of Supervisors duly adopted upon receipt of said report and on said 10th day of April, 1919, and with the assent of a majority of the property taxpayers who were then qualified electors of said county voting at a special election

legally called and duly held on the 17th day of May, 1919, for the purpose of determining whether the above-mentioned series of bonds should be issued.

It is hereby certified, recited and declared that all acts, conditions and things, required to be performed, to exist and to happen, precedent to and in the issuance of this bond, have been performed, have existed and have happened in due time, form and manner, as required by law, and that the bonded and other indebtedness of said county, including this bond and all other bonds of the above-mentioned series, does not exceed ten per centum of the taxable property of said county as shown by the last assessment roll thereof. [92]

The full faith, credit and resources of the said County of Maricopa are hereby irrevocably pledged for the punctual payment of the principal and interest of this bond.

In Witness Whereof The said County of Maricopa by its Board of Supervisors has caused this bond to be signed by the Chairman and attested by the Clerk of said Board of Supervisors and the seal of the said Board of Supervisors to be hereunto affixed this 15th day of June, 1919.

W. K. BOWEN

Chairman of the Board of Supervisors of the
County of Maricopa, State of Arizona.

Attest:

CLARENCE L. STANDAGE

Clerk of the Board of Supervisors of the County
of Maricopa, State of Arizona.

2. That each of the said series of four thousand (\$4,000) bonds shall have attached thereto such number of semi-annual interest coupons in the sum of twenty-seven dollars and fifty cents (\$27.50) each, and payable on the 15th day of June and the 15th day of December of each year during the term of said bond, as shall be sufficient to evidence all the interest to become due on said bond during the term thereof; and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit:

The County of Maricopa, State of Arizona, hereby promises to pay to the holder hereof on the 15th day of 19...., at the office of the County Treasurer of the County of Maricopa, State of Arizona, Twenty-seven dollars and fifty cents in gold coin of the United States, for the semi-annual interest on its highway bond numbered

Election of May 17, 1919.

W. K. BOWEN

Chairman of the Board of Supervisors of Maricopa County, State of Arizona.

Attest:

CLARENCE L. STANDAGE

Clerk of the Board of Supervisors of Maricopa County, State of Arizona.

\$27.50

Coupon Number

3. That the following form for registration shall be printed on the back of each of said bonds as many times as space will reasonably permit, to-wit:

This bond is registered pursuant to the statutes

in such case made and provided in the name of
....., and the interest and principal thereof
are hereby payable to such owner.

.....

State Auditor" [93]

—————

EXHIBIT B

\$1000.00

UNITED STATES OF AMERICA
STATE OF ARIZONA

County of Maricopa

Highway Bond

No..... Election of December 31, 1920. No.....

The County of Maricopa, State of Arizona, for value received, hereby acknowledges itself indebted and promises to pay to the bearer hereof, on the 15th day of January, A.D. 19...., the sum of One Thousand Dollars (\$1000.00) in gold coin of the United States, with interest hereon from date hereof in like gold coin at the rate of six per centum per annum, payable semi-annually on the 15th. day of January and the 15th. day of July of each year, on presentation and surrender of the interest coupons hereto attached. Both principal and interest aforesaid shall be payable at the office of the Treasurer of the County of Maricopa, State of Arizona, or at in the City of New York.

This bond is one of a series of four thousand five hundred bonds of the same date and tenor except as to maturity, numbered respectively from four thousand one (4,001) to eight thousand five hundred (8,500) inclusive, and amounting in the aggregate to Four Million Five Hundred Thousand Dollars (\$4,500,000.00).

This bond is issued by the Board of Supervisors of said County of Maricopa, for the purpose of constructing and improving public highways within and for the said County of Maricopa, pursuant to and in strict compliance with the Constitution of the State of Arizona, and the statutes thereof, including among others Chapter II of Title LII of the Revised Statutes of Arizona, 1913, Civil Code, and Chapter 31 of the Session Laws of Arizona, Regular Session, 1917, and acts amendatory thereof and supplementary thereto, and in pursuance of a resolution of said Board of Supervisors duly adopted on the 16th. day of August, 1920, and the report duly made by the Highway Commission for said County of Maricopa to said Board of Supervisors on the 16th. day of August, 1920 and a resolution by said Board of Supervisors duly adopted upon receipt of said report and on said 16th. day of August, 1920, and with the assent of a majority of the property taxpayers who were then qualified electors of said county voting at a special election legally called and duly held on the 31st. day of December, 1920, for the purpose of determining whether the above-mentioned series of bonds should be issued.

This bond is of the issue which was validated by Act of Legislature of State of Arizona in its Regular Session, 1921, by passage of Senate Bill No. 160, which was approved March 14th, 1921.

It is hereby certified, recited and declared that all acts, conditions and things, required to be performed, to exist and to happen, precedent to and in the issuance of this bond, have been performed, have existed and have happened in due time, form and manner as required by law, and that the bonded and [94] other indebtedness of said county, including this bond and all other bonds of the above-mentioned series, does not exceed ten per centum of the taxable property of said county as shown by the last assessment roll thereof.

The full faith, credit and resources of the said County of Maricopa, are hereby irrevocably pledged for the punctual payment of the principal and interest of this bond.

In Witness Whereof the Said County of Maricopa by its Board of Supervisors has caused this bond to be signed by the Chairman and attested by the Clerk of said Board of Supervisors, and the seal of the said Board of Supervisors to be hereunto affixed this 15th. day of January, 1921.

GUY F. VERNON

Chairman of the Board of Supervisors of the
County of Maricopa, State of Arizona.

Attest:

.....

Clerk, of the Board of Supervisors of the County
of Maricopa, State of Arizona.

2. That each of the said series of four thousand five hundred (4,500) bonds shall have attached thereto such number of semi-annual interest coupons in the sum of Thirty Dollars (\$30.00) each, and payable on the 15th. day of January and the 15th. day of July of each year during the term of said bond, as shall be sufficient to evidence all the interest to become due on said bond during the term thereof; and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit: (except changes as to dates of payments):

“The County of Maricopa, State of Arizona, hereby promises to pay to the holder hereof on the 15th. day of January, 19...., at the office of the County Treasurer of the County of Maricopa, State of Arizona, Thirty Dollars (\$30.00) in gold coin of the United States, for the semi-annual interest on its highway bond numbered

Election of December 31st, 1920.

.....

Chairman of the Board of Supervisors of Maricopa County, State of Arizona.”

Attest:

.....

Clerk of the Board of Supervisors of Maricopa County, State of Arizona.

\$30.00

Coupon Number.....

3. That the following form for registration shall

be printed on the back of each of said bonds as many times as space will reasonably permit, to-wit:

[95]

.....19....

This bond is registered pursuant to the statutes in such case made and provided and in the name of, and the interest and principal thereof are hereafter payable to such owner.

.....

State Auditor

[Endorsed]: Filed May 17 1943. [96]

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANTS TO
AMENDED COMPLAINT

Now come defendants Maricopa County, John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Arizona; Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor, and Jim Brush, State Treasurer, constituting the Loan Commissioners of the State of Arizona; Jim Brush, State Treasurer, and Ana Frohmiller, State Auditor of the State of Arizona, and for amended answer to the amended complaint of plaintiffs on file herein, admit, allege, and deny as follows:

FIRST DEFENSE

I.

The amended complaint fails to state a claim against defendants upon which relief can be granted. [97]

SECOND DEFENSE

I.

Defendants admit the allegations contained in paragraphs I, II, and III of plaintiffs' amended complaint.

II.

Defendants deny the allegation contained in paragraph IV of plaintiffs' amended complaint that said bonds, held by the State of Washington, are payable as of their respective due date without acceleration of maturity, and allege that said bonds are redeemable prior to their maturity dates as provided by the laws of the State of Arizona in Chapter I, Title 52, Revised Statutes of 1913 of said state.

III.

Defendants deny the allegation contained in paragraph V of plaintiffs' amended complaint that said bonds held and owned by plaintiff Equitable Life Insurance Company of Iowa are payable as of their respective due dates without acceleration of maturity; and allege that said bonds are redeemable prior to their maturity dates as provided by the laws of the State of Arizona in Chapter I, Title 52, Revised Statutes of 1913 of said state.

IV.

Defendants admit the allegations stated in paragraph VI of plaintiffs' amended complaint insofar as they assert the existence of the statutes of the State of Arizona therein referred to. Defendants deny each and every allegation contained in paragraph VII of plaintiffs' amended complaint and in this respect defendants allege that the Maricopa County Highway Bonds referred to in the complaint were at all times subject to redemption as provided in Chapter I, Title 52, Arizona Revised Statutes of 1913. [98]

V.

Defendants admit the allegations of paragraphs VIII, IX, X, and XI of said complaint insofar as they assert the existence of the laws of the State of Arizona and the proceedings thereunder for the issuance of said Maricopa County Highway Bonds. Defendants deny each and every allegation contained in paragraph XII of plaintiffs' amended complaint.

VI.

Defendants admit the allegations contained in paragraphs XIII, XIV, XV, and XVI of plaintiffs' amended complaint insofar as they assert the existence of the laws of the State of Arizona and proceedings thereunder for the issuance of Maricopa County Highway Bonds. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XVII of said amended complaint. Defendants admit the alle-

gations contained in paragraphs XVIII, XIX, and XX of plaintiffs' amended complaint insofar as they assert the existence of the laws of the State of Arizona and proceedings thereunder for the issuance of Maricopa County Highway Bonds. Defendants deny each and every allegation contained in paragraph XXI of said complaint.

VII.

Defendants admit the allegations contained in paragraphs XXII, XXIII, and XXIV of plaintiffs' amended complaint and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XXV of said complaint.

VIII.

Answering the allegations of paragraph XXVI of plaintiffs' amended complaint, defendants admit that in the year 1942 the Board [99] of Supervisors of Maricopa County adopted a resolution demanding that the Loan Commissioners of the State of Arizona issue refunding bonds for the purpose of redeeming and refunding all of the bonds of the two issues of Maricopa County described in the complaint; that the Loan Commissioners refused to issue such refunding bonds of the State of Arizona and that thereupon the said Board of Supervisors of Maricopa County instituted an original mandamus proceeding in the Supreme Court of the State of Arizona to compel said Loan Commissioners to refund and redeem said bonds under the

provisions of the laws of the State of Arizona in force and effect at the time of the issuance of said Maricopa County Highway Bonds. (That said proceeding was thereafter duly heard by the Supreme Court of the State of Arizona and that plaintiffs herein and all other holders and owners of the bonds of said Maricopa County described in said complaint were and became parties to said proceeding in a class, and, as defendants are informed and believe, were represented in said proceeding by Messrs. Gust, Rosenfeld, Divelbess, Robinette and Coolidge, their attorneys (said attorneys being the attorneys for plaintiffs in the above entitled cause) and by Messrs. Pershing, Bosworth, Dick & Dawson and by Messrs. Cox & Cox and Herbert Watson. That J. L. Gust, Esq., attorney for plaintiffs in the above entitled cause, appeared in said mandamus proceeding in the Supreme Court of the State of Arizona on behalf of plaintiffs herein and the owners and holders of all other bonds of Maricopa County, as defendants are informed and believe, and that the said Supreme Court of Arizona by order duly made and entered authorized and permitted such appearance. That likewise said Pershing, Bosworth, Dick & Dawson and said Cox & Cox and Herbert Watson appeared in said mandamus proceeding on behalf of the owners and holders of all outstanding bonds of Maricopa [100] County and, as defendants are informed and believe, the said matter was duly heard and upon the hearing thereof the Supreme Court of the State of Arizona, on May 4, 1942, rendered its

decision entitled: "Maricopa County vs. Osborn, et al, Ariz., 125 Pac. (2d) 703," which is hereby referred to and by reference incorporated herein and made a part hereof. That thereafter the owners and holders of said bonds of Maricopa County represented, as defendants are informed and believe, by said Messrs. Gust, Rosenfeld, Divelbess, Robinette and Coolidge, Messrs. Pershing, Bosworth, Dick & Dawson, and Messrs. Cox & Cox and Herbert Watson, petitioned said Supreme Court of Arizona for a rehearing and that thereafter, to-wit, on or about September 16th, 1942, the Supreme Court of Arizona denied said motion for rehearing and issued its Peremptory Writ of Mandate ordering and directing said Loan Commissioners to proceed with the refunding of said Maricopa County Highway Bonds and to redeem said Maricopa County Highway Bonds, and in said opinion decided and held that Chapter 1, Title 52, Revised Statutes of Arizona, 1913, was applicable to the redemption and refunding of said issues of bonds of Maricopa County of which the bonds described in the complaint as held by said plaintiffs are a part. That thereafter the Board of Supervisors of Maricopa County demanded that said Loan Commissioners proceed with the redemption of said Maricopa County Highway bonds and said Loan Commissioners, thereupon adopted a resolution calling for bids for the State of Arizona Refunding Bonds to refund and redeem the remainder of the two issues of Maricopa County Highway Bonds described in the complaint remain-

ing outstanding, including all of the bonds owned and held by plaintiffs as alleged in the complaint. > That notice of the sale of said State of Arizona Refunding Bonds was duly and regularly advertised and in response to said call for [101] bids, a syndicate of investment bankers offered to purchase the same at the par value thereof and accrued interest thereon and a premium, and offered to purchase said State of Arizona Refunding Bonds at an interest rate of only $2\frac{3}{4}\%$ per annum, and that said Loan Commissioners on February 10, 1943, awarded said State of Arizona Refunding Bonds in the principal amount of \$4,100,000, bearing interest at $2\frac{3}{4}\%$ per annum to said syndicate of investment bankers. That the difference in interest on the said refunding bonds, to-wit, $2\frac{3}{4}\%$ per annum, as compared to interest accruing on the outstanding bonds of Maricopa County, to-wit, $5\frac{1}{2}\%$ and 6% , will effect a saving to Maricopa County and its taxpayers of more than 3% on the \$4,100,000 principal amount of bonds to be redeemed, or a saving in excess of \$124,000 per year in interest. That after awarding said bonds to said syndicate of investment bankers, said Loan Commissioners, acting on the advice of the Attorney General of the State of Arizona, refused to execute or deliver the said $2\frac{3}{4}\%$ State of Arizona Refunding Bonds to said purchasers and that thereupon Maricopa County instituted a proceeding in the Supreme Court of the State of Arizona in mandamus to compel said Loan Commissioners to execute and deliver said $2\frac{3}{4}\%$ refunding bonds. That

on April 12, 1943 the Supreme Court of the State of Arizona rendered its decision, entitled: "Maricopa County vs. Osborn, et al, Ariz. Pac. (2d) . . .," a copy of which is attached to the answers of these defendants to the original complaint filed herein, ordering and directing that the Alternative Writ of Mandate issued in said proceeding be made peremptory and that said Loan Commissioners execute and deliver all of said 2¾% State of Arizona Refunding Bonds to said purchasers, and in and by said opinion declared the law of the State of Arizona and held and adjudicated that the outstanding highway bonds of Maricopa County are and were subject to redemption at any time prior to their fixed maturity dates at the option of [102] Maricopa County and were subject to redemption from the proceeds of the sale of said 2¾% State of Arizona Refunding Bonds. Defendants Deny each and every other allegation contained in said paragraph XXVI.

IX.

Defendants deny each and every allegation contained in paragraph XXVII of plaintiffs' amended complaint.

X.

For answer to paragraph XXVIII of plaintiffs' amended complaint defendants admit that the purchasers of said bonds will accept and pay for the same as soon as their attorneys render an opinion approving the validity of said bonds, and as soon as said bonds are ready for delivery, but deny each

and every remaining allegation contained in said paragraph.

XI.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XXIX of said complaint.

XII.

For answer to paragraph XXX of plaintiffs' amended complaint defendants admit the enactment and provisions of Chapters I and II of Title 52 of Arizona Revised Statutes of 1913, and also the various acts of the Legislature of the State of Arizona, and the provisions of the Constitution of the State of Arizona and the provisions of the acts of Congress set forth in said Paragraph XXX of said amended complaint, but deny that said Maricopa County Highway Bonds are subject to redemption as alleged by plaintiffs, but allege that said bonds are subject to redemption as provided by said Chapter I of Article 52 of Arizona Revised Statutes of 1913, and in this respect defendants allege that the law of the [103] State of Arizona is, and has been, finally and conclusively adjudicated by the decisions of the Supreme Court of the State of Arizona as set forth in those decisions, heretofore referred to.

XIII.

Defendants deny each and every allegation contained in paragraph XXXI of plaintiffs' amended complaint, except defendants admit the enactments and provisions of law of the State of Arizona

therein pleaded, and in this respect defendants allege that the law of the State of Arizona is, and has been, by the decisions of the Supreme Court of the State of Arizona finally and conclusively adjudicated, as aforesaid.

XIV.

Defendants admit the enactment and provisions of the laws of the state of Arizona, as alleged in paragraph XXXII of plaintiffs' amended complaint, but deny that the board of supervisors of Maricopa County are exercising any legislative function in refunding the said Maricopa County Highway Bonds, and in this respect defendants allege that the authority of the Loan Commissioners of the State of Arizona to refund said Maricopa County Highway Bonds is authorized by Chapter I of Title 52, of the Revised Statutes of Arizona 1913, as construed by the decisions of the Supreme Court of the State of Arizona, as aforesaid, and that said provisions of law for the refunding of said outstanding Maricopa County Highway Bonds was a valid enactment by the Legislature of the State of Arizona, in force and effect at the time said Maricopa County Highway Bonds were issued, and consequently no act of the Board of Supervisors of Maricopa County, or said Loan Commissioners, by invoking the provisions of said Chapter I of Article 2 of the Revised Statutes of Arizona 1913 could operate to impair the obligation of contract arising out of their ownership of said Maricopa County [104] Highway Bonds. Defendants

admit that said outstanding Maricopa County Highway Bonds will be called for redemption when said refunding bonds are sold to the purchasers thereof and that such proceedings will be taken by the Loan Commissioners of the State of Arizona as is authorized by law for the effective refunding of said Maricopa County Highway Bonds, but deny that such proceedings will impair the obligation of contract arising out of the ownership of said Maricopa County Highway Bonds by plaintiffs herein.

XV.

Defendants admit the enactment and provisions of the various refunding acts of the Legislature of the State of Arizona, as alleged in paragraph XXXIII of plaintiffs' amended complaint, but deny each and every other allegation contained in said paragraph, and in this respect defendants refer to said decisions of the Supreme Court of Arizona.

XVI.

Defendants deny each and every allegation contained in paragraph XXXIV of plaintiffs' amended complaint.

XVII.

Defendants deny each and every allegation contained in paragraph XXXV of plaintiffs' amended complaint.

XVIII.

Defendants deny each and every allegation contained in paragraph XXXVI of plaintiffs' amended complaint.

XIX.

Defendants deny that they are proceeding to violate any rights of plaintiffs as alleged in paragraph XXXVII of plaintiffs' [105] amended complaint, and allege that they are without knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph.

THIRD DEFENSE

Defendants allege that the cause of action set forth in plaintiffs' amended complaint for declaratory judgment is barred by the decisions and judgments of the Supreme Court of the State of Arizona, heretofore referred to and by reference made a part hereof, in that said decisions and judgments of the Supreme Court of the State of Arizona are res adjudicata and that by reason thereof the matters in this proceeding were finally adjudicated and settled and that plaintiffs herein are thereby barred from maintaining or prosecuting this suit.

FOURTH DEFENSE

Defendants allege that plaintiffs herein have instituted this action for the purpose of harassing defendants and delaying, impeding, hindering, and obstructing them from carrying out and complying with the peremptory writs of mandamus issued out of the Supreme Court of the State of Arizona in the cases decided in that court, heretofore referred to, authorizing the refunding of said Maricopa County Highway Bonds, and that the maintenance

of this action by plaintiffs constitutes vexatious litigation.

Wherefore defendants pray that plaintiffs be denied the relief prayed for by their amended complaint herein and that said complaint be dismissed; and for such other and further [106] relief as may be meet and proper in the premises; and for their costs herein expended.

HAROLD R. SCOVILLE

Maricopa County Attorney

LESLIE C. HARDY

Special Counsel for Maricopa
County

Attorneys for the Defendants Maricopa County
and the Officials of Maricopa County, Arizona

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney Gen-
eral

Attorneys for the Defendants Who Are Officials of
the State of Arizona.

[Endorsed]: Filed May 17 1943. [107]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT UNDER RULE 56

To: Messrs. Gust, Rosenfeld, Divillbess, Robinette,
& Coolidge, attorneys for plaintiffs herein:

Please Take Notice, that on the 17th day of May, 1943, at the hour of 10:00 A. M., or as soon thereafter as counsel can be heard, the undersigned attorneys for the defendants herein will appear before the Judge of the above entitled Court, and move that summary judgment be entered herein in accordance with Rule 56 of the Federal Rules of Civil Procedure for the District Courts of the United States.

In support of said motion for summary judgment the undersigned counsel for the defendants herein will file with the Clerk of the above entitled Court, as constituting a part of the record herein, the following:

1. Motion for Summary Judgment Under Rule 56(b). [108]

2. Affidavit in Support of Motion for Summary Judgment Under Rule 56, executed by Earl Anderson, Chief Assistant Attorney General of the State of Arizona, of Counsel for the defendants named herein who are state officials.

3. Affidavit in Support of Motion for Summary Judgment Under Rule 56, executed by Leslie C. Hardy, Special Counsel for the defendant Maricopa County, and for the public officials of that county named as defendants herein.

4. Answer of Defendants Maricopa County; John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Arizona.

5. Answer of Defendants Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor, and Dan

E. Garvey, State Treasurer, Constituting the Loan Commissioners of the State of Arizona; Dan E. Garvey, State Treasurer, and Ana Frohmiller, State Auditor of the State of Arizona.

6. Memorandum of Points and Authorities on Behalf of all Defendants in Support of Motion for Summary Judgment Under Rule 56.

Copies of each and all of the foregoing enumerated documents are herewith served upon you as counsel for plaintiffs herein.

In the presentation of said motion for summary judgment to the Judge of the above entitled Court, at the time indicated, as aforesaid, the documents above enumerated, together with the complaint on file herein, and such other parts of the record herein as may be appropriate thereto, will be presented to the Judge of the above entitled Court for his consideration in disposing of said motion for summary judgment. [109]

Dated this 29th day of April, 1943.

HAROLD R. SCOVILLE

Maricopa County Attorney

LESLIE C. HARDY

Special Counsel for Maricopa
County

Attorneys for the Defendants Maricopa County;
John A. Foote, Ed Oglesby and Phil Isley,
Constituting the Board of Supervisors of Maricopa County, Arizona.

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney General

Attorneys for the Defendants Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor, and Dan E. Garvey, State Treasurer, Constituting the Loan Commissioners of the State of Arizona; Dan E. Garvey, State Treasurer, and Ana Frohmiller, State Auditor of the State of Arizona.

On this 29th day of April, 1943, the undersigned counsel for the plaintiffs herein, do hereby admit service of copies of the foregoing Notice of Motion for Summary Judgment, together with the documents enumerated therein and numbered from one to six inclusive.

GUST, ROSENFELD, DIVIL-
BESS, ROBINETTE and
COOLIDGE,

By J. L. GUST

Attorneys for the Plaintiffs.

[Endorsed]: Filed Apr 29 1943. [110]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
UNDER RULE 56 (b)

Defendants Maricopa County; and John A. Foote; Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Arizona; Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor, and Dan E. Garvey, State Treasurer, constituting the Loan Commissioners of the State of Arizona; Dan E. Garvey, State Treasurer, and Ana Frohmiller, State Auditor of the State of Arizona, move the Court as follows:

1. For summary judgment in favor of defendants as to the whole of the claim asserted by plaintiffs State of Washington and the Equitable Life Insurance Company of Iowa.

2. For summary judgment that this Court is bound by the decisions of the Supreme Court of the State of Arizona in the cases of Maricopa County v. Osborn, et al, (1942),.....Ariz.....; 125 P. (2d) 703, and the decision rendered by that Court on [111] April 12, 1943, in the subsequent case of Maricopa County v. Osborn, et al, Ariz., ... P. (2d) ..., holding that the Maricopa County Highway Bonds herein the subject of litigation are redeemable and refundable prior to their respective maturity dates, as provided by the laws of the State of Arizona.

3. For summary judgment that the Maricopa County Highway Bonds herein the subject of litigation be adjudged to be redeemable and refundable prior to their respective maturity dates by the

Loan Commissioners of the State of Arizona.

4. For summary judgment that upon the giving of notice for call and redemption of the outstanding Maricopa County Highway Bonds as prescribed by the statutes of the State of Arizona, Maricopa County will cease to remain liable to these plaintiffs as bondholders and to all holders of Maricopa County Highway Bonds for payment of interest on said bonds accruing thereafter.

5. For summary judgment that defendants' action in refunding said outstanding Maricopa County Highway Bonds will infringe none of plaintiffs' rights under the Constitution of the United States.

6. For summary judgment that defendants have and recover their costs of suit herein incurred.

Dated this 29th day of April, 1943.

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney General

Attorneys for the Defendants Sidney P. Osborn,
Governor, and Other State Officials Named as
Defendants.

HAROLD R. SCOVILLE

Maricopa County Attorney

LESLIE C. HARDY

Special Counsel for Maricopa County

Attorneys for the Defendants Maricopa County
and the Officers Thereof Named as Defendants

[Endorsed]: Filed Apr 29 1943. [112]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT UNDER RULE 56

State of Arizona,
County of Maricopa.—ss.

Leslie C. Hardy, first being duly sworn, deposes and says:

1. That he was at all times mentioned herein, and he is now, an attorney engaged in the practice of law in the Courts of the State of Arizona, as well as in the United States District Court for the District of Arizona, and that he is authorized to appear herein in association with the County Attorney of Maricopa County, and was also authorized to appear as special counsel for Maricopa County, as plaintiff, in an original action in mandamus brought before the Supreme Court of the State of Arizona on March 4, 1943, entitled: "Maricopa County, a body politic and corporate vs. Sidney P. Osborn, Governor of the State of Arizona, Ana Frohmiller, State Auditor [113] of the State of Arizona; and J. D. Brush, State Treasurer of the State of Arizona, constituting the Loan Commissioners of the State of Arizona, No. 4606", and that although pending at the time of the filing of the complaint herein before this Court, said action in mandamus was decided by the Supreme Court of the State of Arizona on April 12, 1943.

2. That in his capacity as special counsel affiant became and is now personally familiar with the

facts surrounding the indebtedness of the said Maricopa County in the principal amount of \$4,100,000 of Maricopa County Highway Bonds.

3. That defendant, Maricopa County heretofore, to-wit, under date of June 15, 1919, pursuant to the laws of the State of Arizona, duly authorized and issued \$4,000,000 principal amount of Highway Bonds, bearing interest at the rate of $5\frac{1}{2}\%$ per annum, payable semi-annually, maturing over a period of 20 years beginning June 15, 1930, of which issue there were on or about July 7, 1941, outstanding and unpaid bonds in the principal amount of \$2,100,000, whereof there are now outstanding and unpaid as of the date hereof \$1,700,000 principal amount of said bonds, being bonds numbered 2301 to 4000, both inclusive, which mature and become payable in serial amounts on June 15th in each of the years 1944 to 1949, both inclusive. That of said issue there is also outstanding and unpaid \$200,000 principal amount of bonds maturing June 15, 1943.

4. That defendant, Maricopa County, heretofore, to-wit, under date of January 15, 1921, pursuant to the laws of the State of Arizona, duly authorized and issued \$4,500,000 principal amount of Highway Bonds, bearing interest at the rate of 6% per annum, payable semi-annually, maturing over a period of 20 years beginning January 15, 1931, of which issue there were on or about July [114] 7, 1941, outstanding and unpaid bonds in the principal amount of \$2,800,000, whereof there are now outstanding and unpaid as of the date hereof

\$2,400,000 principal amount of said bonds, being bonds numbered 6101 to 8500, both inclusive, which mature and become payable in serial amounts on January 15th in each of the years 1944 to 1951, both inclusive.

5. That on July 7, 1941, the Board of Supervisors of Maricopa County passed and adopted a resolution officially demanding that the Loan Commissioners of the State of Arizona redeem and refund said issued and outstanding Highway Bonds of Maricopa County in the aggregate principal amount of \$4,900,000, which aggregate principal amount was outstanding as of said July 7, 1941, and by such resolution the Board of Supervisors of Maricopa County found and recited that the redeeming and refunding of such outstanding indebtedness would be for the profit and benefit of Maricopa County.

6. That on November 7, 1941, said Loan Commissioners informed the Board of Supervisors of Maricopa County, in writing, that they were unauthorized to refund said outstanding indebtedness of Maricopa County as demanded by Maricopa County, as aforesaid, and said Loan Commissioners did thereupon refuse to redeem and refund said outstanding Highway Bonds of Maricopa County or to provide for the refunding thereof, and thereupon, to-wit, on February 2, 1942, Maricopa County filed an original action in mandamus in the Supreme Court of the State of Arizona, which proceedings were entitled as hereinbefore set forth in paragraph 1, to command said Loan Commissioners

to redeem and refund said outstanding indebtedness of Maricopa County notwithstanding the refusal of said Loan Commissioners to do so.

7. That said original action filed in the Supreme Court [115] of the State of Arizona, as aforesaid, duly came on for hearing and decision, and on May 4, 1942, said Court rendered and entered its judgment making peremptory the alternative writ of mandamus which had theretofore issued in said action, and by said peremptory writ of mandamus said Loan Commissioners were commanded to redeem said outstanding indebtedness of Maricopa County; that on September 16, 1942, said Supreme Court of the State of Arizona, reaffirmed its judgment by denial of a petition for rehearing filed by defendants in said original action for mandamus.

8. That in said decision, the Supreme Court of the State of Arizona held and determined that the statutes of the State of Arizona, being Chapter I, Title 52, Arizona Revised Statutes of 1913, were in full force and effect on the dates of June 15, 1919, and January 15, 1921, being respectively the dates of issuance of Maricopa County Highway Bonds, and that said statutes entered into and became a part of said Maricopa County Highway Bonds; that Chapter I, Title 52, Arizona Revised Statutes of 1913, authorized the call and redemption and refunding of said bonds prior to their respective maturity dates; that the calling of outstanding Maricopa County Highway Bonds for the redemption and refunding prior to their respective maturity dates was a legal and valid power con-

ferred upon the Loan Commissioners of the State of Arizona by the provisions of Chapter I, Title 52, Arizona Revised Statutes of 1913, and that it became the duty of said Loan Commissioners to call said bonds for redemption and refunding upon official demand of the County of Maricopa. That in view of the foregoing decision, the alternative writ of mandamus issued therein was made peremptory.

9. That in said original proceedings in mandamus brought in the Supreme Court of the State of Arizona by the [116] County of Maricopa on February 2, 1942, plaintiffs' attorneys herein, being Messrs. Gust, Rosenfeld, Divelbess, Robinette & Coolidge, appeared therein and were authorized and permitted to appear therein by order of said Supreme Court duly made and entered. That said proceeding was thereafter duly heard by the Supreme Court of the State of Arizona and that, as affiant is informed and believes, plaintiffs herein and all other holders and owners of the bonds of said Maricopa County described in said complaint were and became parties to said proceeding as a class and were represented in said proceeding by their attorneys Messrs. Gust, Rosenfeld, Divelbess, Robinette & Coolidge, and/or by their attorneys Messrs. Pershing, Bosworth, Dick & Dawson of Denver, Colorado, and/or by Messrs. Cox and Cox and Herbert Watson of Phoenix, Arizona. That said attorneys for plaintiffs herein made the same contention before the Supreme Court of Arizona as is now made by them before this Court to the effect that the Loan Commissioners of the State of

Arizona had no authority under the laws of the State of Arizona to redeem outstanding Maricopa County Highway Bonds prior to their fixed maturity dates. That in said proceedings said attorneys who now represent the plaintiffs in this action had fully considered and determined against them all arguments to the effect that said bonds were not redeemable prior to their respective maturity dates and refundable by the issuance of State of Arizona Refunding Bonds. That the brief of plaintiff's attorneys filed in said action, a copy of which is annexed hereto and marked "Exhibit C," and which is hereby referred to and by reference incorporated herein and made a part hereof, reads in part on pages 6-7, and 17-18 as follows:

"Proposition number 1 stated above, to the effect that the bonds of Maricopa County which said county desires to refund, were issued with a definite maturity date without provisions for calling before maturity in exact compliance with [117] Chapter 2, Title 52, Civil Code 1913, is clear from an examination of Sections 5266 to Section 5281, both inclusive. Said sections provide a complete procedure for authorization by the electors, the issuance, payment and retirement of county, school district and municipal bonds. No aid from Chapter 1 of said Title 52 is required to provide for such authorization, issuance, payment or retirement of said bonds. Section 5273 expressly requires that the call for the elections shall set forth among other things the term of the bonds and the date of maturity of the bonds. Section 5274 says that the bonds

shall be payable at a date not to exceed forty years from the date of their issuance. Section 5279 provides that the tax to be levied shall provide a fund for the redemption of the bonds when they mature and Section 5281 provides that when the bonds shall mature it shall be the duty of the county or city or town treasurer, as the case may be, to give notice for four weeks in some newspaper, of the intention to redeem such bonds, and for the application of money on hand to such redemption. Clearly the provisions of these sections authorize the officials of the counties and municipalities, when so directed by the electors at an election, to make bonds payable at a definite maturity date without provision for prior call and when they have so issued bonds a contract has been entered into by the purchasers of these bonds with the county or municipality that cannot be set aside at a later date by either party because the exigencies of finance make it profitable to escape from the contract. * * *

* * * * *

“Proposition number 5, above stated, to the effect that the provisions of 5273 providing a date of maturity for bonds to be stated in the call for election and provisions of Section 5279 providing for the levy of a tax to pay said bonds until they mature, and the provisions of Section 5281 providing for the retirement of such bonds after maturity, cannot be held to have been repealed by the provisions for refunding and the provisions reserving the right to call bonds contained in Sections 5252

and 5253, Chapter 1 of said Title 52, is very clear for several reasons. In the first place as has been pointed out, the provisions in Chapter 2 refer to an entirely different kind of bond than do the provisions in Chapter 1.

“In the second place, no express repeal being made, an implied repeal will not be presumed unless the two provisions cannot stand together. * * *.”

[118]

10. That pursuant to said peremptory writ of mandamus issued from the Supreme Court of the State of Arizona, said Loan Commissioners duly passed and adopted a resolution authorizing the issuance of refunding bonds of the State of Arizona for the purpose of redeeming said Maricopa County Highway Bonds then outstanding. That through proceedings duly and regularly taken under the laws of the State of Arizona, due notice was given and bids were called for by the said Loan Commissioners for the purchase of refunding bonds of the State of Arizona in the principal amount of \$4,100,000. That said Loan Commissioners, to-wit, on February 10, 1943, accepted by resolution incorporated in the Minutes of a Meeting of the Loan Commissioners of the State of Arizona, annexed hereto, marked “Exhibit B”, the joint bid of, and awarded the purchase of said refunding bonds to, Bank of America National Trust and Savings Association, Boettcher and Company, and R. H. Moulton & Company. That notwithstanding said award and sale of said State of Arizona Refunding Bonds, said Loan Commissioners, on February 12,

1943, advised the Board of Supervisors of Maricopa County, in writing, as such Loan Commissioners, that they would not execute or deliver any of said refunding bonds to said purchasers and said Loan Commissioners refused to execute or deliver any of said State of Arizona Refunding Bonds to said purchasers. That thereupon the County of Maricopa, as plaintiff, on March 4, 1943, brought a second original action in mandamus in the Supreme Court of the State of Arizona to compel said Loan Commissioners to call and redeem said outstanding bonds of the County of Maricopa and issue therefor refunding bonds of the State of Arizona as demanded by the Board of Supervisors of Maricopa County by official resolution under date of July 7, 1941.

11. That said second original action filed in the Supreme Court of the State of Arizona, as afore-said, duly came on [119] for hearing and decision, and on April 12, 1943, said Court regularly rendered and entered its judgment making peremptory the alternative writ of mandamus which had theretofore issued in said action; and by said peremptory writ of mandamus said Loan Commissioners were directed and commanded to execute and deliver \$4,100,000 refunding bonds of the State of Arizona for the purpose of redeeming a like amount of outstanding Maricopa County Highway Bonds.

12. That in said opinion, a copy of which is annexed to the answers of defendants and marked "Exhibit A", said Supreme Court of the State of Arizona, reaffirming its former decision in the case

of Maricopa County vs. Osborn (1942), Ariz.; 125 Pac. (2d) 703, held and determined that outstanding Maricopa County Highway Bonds in the principal amount of \$4,100,000 were redeemable prior to their respective maturity dates under the provisions of Chapter I, Title 52, Arizona Revised Statutes of 1913, and were refundable by the issuance of State of Arizona Refunding Bonds.

13. That said judgment of the Supreme Court of the State of Arizona rendered and entered April 12, 1942, adjudicates in every material respect, both as to substance and procedure, the right of Maricopa County under the Constitution and statutes of the State of Arizona to redeem and refund \$4,100,000 principal amount of outstanding Maricopa County Highway Bonds herein the subject of litigation.

14. That said judgments of the Supreme Court of the State of Arizona finally determining the law of the State of Arizona in respect of the right of Maricopa County to redeem its outstanding indebtedness are valid and binding on defendants as and constituting the Loan Commissioners of the State of Arizona. [120]

15. That there is no genuine triable issue of material fact herein; that the only issues herein involved are issues of law upon which defendants and all of them are entitled to judgment as prayed for.

16. That by virtue of the decision of the Supreme Court of the United States in the case of Erie R.R. Co. vs. Tompkins (1938), 304 U.S. 64,

58 S. Ct. 817, 82 L.Ed. 118, 114 A.L.R. 1487, these decisions of the Supreme Court of Arizona finally establishing the law of the State of Arizona are, as affiant verily believes, binding and conclusive on this Court. That, accordingly, no federal question is involved in this proceeding and the law of the State of Arizona, which is binding upon this Court, having been finally established by decisions of the Supreme Court of Arizona requires that judgment be entered in favor of defendants.

LESLIE C. HARDY.

Subscribed and sworn to before me this 28th day of April, 1943.

[Seal]

AGNES WESTRA,

Notary Public.

My Commission will expire: July 2, 1943. [121]

EXHIBIT "C"

In the Supreme Court of the State of Arizona

No. 4489

MARICOPA COUNTY, a Municipal Corporation,
Plaintiff,

vs.

SIDNEY P. OSBORN, Governor of the State of
Arizona; ANA FROHMILLER, State Audi-
tor, and JOE HUNT, State Treasurer, Consti-
tuting the LOAN COMMISSIONERS OF
THE STATE OF ARIZONA,

Defendants.

Exhibit "C"—(Continued)

BRIEF OF GUST, ROSENFELD, DIVELBESS,
ROBINETTE AND COOLIDGE, AS AMICI
CURIAE

This brief is filed by the undersigned members of the bar of this court as amici curiae pursuant to an order of the court permitting the same to be filed. It is not our purpose to question generally the statement of facts made by the plaintiff in its brief, nor the correctness of the legal propositions advanced in that brief. We desire to call the attention of the court to what we believe to [122] be a fallacy underlying the theory of the plaintiff's case and the arguments advanced in support of that case.

This fallacy lies in the plaintiff's assuming that the retirement of county and municipal bonds, issued under Chapter 2, Title 52, Civil Code of 1913, is governed by the provisions of Chapter 1 of said Title, rather than by the provisions of the chapter under which said bonds were issued. We believe that the following propositions will make clear to the court that this fallacy permeates plaintiff's theory of this case and that when said fallacy is corrected mandate cannot issue as prayed for:

1. The bonds the plaintiff Maricopa County desires to have refunded by the State Loan Commissioners in this case were issued with a definite maturity date, without provision for call before maturity, in exact compliance with Chapter 2, Title 52, Civil Code of 1913, which contains a complete procedure for the authorization, issuance, payment

Exhibit "C"—(Continued)

and retirement of county and other municipal bonds.

2. The provisions of Section 5252, contain- [123] ed in Chapter 1, Title 52 Civil Code of 1913, making it the duty of the State Loan Commissioners to issue new bonds for the purpose of paying, redeeming and refunding existing indebtedness when the same can be issued at a lower rate of interest than previously paid, do not apply to unmatured bonds, unless such bonds are subject to call or are voluntarily surrendered by the holders.

3. The provisions of Section 5253, Chapter 1, of Title 52, Civil Code of 1913, providing that the state reserves the right to redeem at par bonds in their numerical order fifteen years after the date thereof, apply only to bonds issued by the State Loan Commissioners for state indebtedness and do not apply to bonds issued by counties or municipalities, under the provisions of Chapter 2 of Title 52, Civil Code of 1913.

4. The provision in Section 5260, in Chapter 1 of Title 52, Civil Code of 1913, authorizing the State Loan Commissioners on demand from the Board of Supervisors or municipal or school districts, to provide for the redeeming or refunding of county, municipal or school district indebtedness in the same manner as [124] other state indebtedness, refers only to the procedure for refunding and does not write into county and municipal bonds issued under Chapter 2, Title 52, Civil Code of 1913, the reservation of the right to redeem bonds issued

Exhibit "C"—(Continued)

by the Loan Commissioners reserved to the state by Section 5253 of Chapter 1 of said Title 52.

5. The provisions of Section 5273, Chapter 2, Title 52, Civil Code of 1913, providing a date of maturity for bonds to be stated in the call for the election and the provisions of Section 5279 in said Chapter 2, providing for the levy of a tax to pay said bonds until they mature and the provisions of Section 5281 in said Chapter, providing for the retirement of such bonds after maturity cannot be held to have been repealed by the provisions for refunding and the provisions reserving the right to call bonds contained in Sections 5252 and 5253 in Chapter 1 of said Title 52, (a) for the reason that they do not refer to the same kind of bonds, (b) such implied repeal is not presumed unless the two provisions cannot stand together, (c) Sections 5273 and 5279 and several other sections of Chapter 2 were enacted after Chapter 1, (d) Chapter 29 Laws [125] of 1912 First Special Session, being the original enactment of Chapter 1, Title 52, did not comply with the constitutional provision relating to amending acts and (e) the provisions of both chapters are preserved for operation in their respective fields by the code revisions of 1913 and 1928.

6. Admitting that it is the duty of the Loan Commissioners to proceed to refund county bonds on the request of the county under the provisions of Section 5260, Chapter 1, Title 52, Civil Code of 1913, the mandate in this case cannot be granted because Maricopa County does not show that it has

Exhibit "C"—(Continued)

any bonds to be refunded as the bonds in question are not yet due and are not subject to call before maturity.

7. Mandamus should not issue to require the Loan Commissioners to proceed under the provisions of Section 5260, Chapter 1, Civil Code of 1913, until Maricopa County has established its right to call the bonds in question by appropriate proceedings against the bondholders for until such right is established, there is no plain and clear duty on the part of the State Loan Commissioners to proceed.

ARGUMENT [126]

Proposition number 1 stated above, to the effect that the bonds of Maricopa County which said county desires to refund, were issued with a definite maturity date without provisions for calling before maturity in exact compliance with Chapter 2, Title 52, Civil Code 1913, is clear from an examination of Sections 5266 to Section 5281, both inclusive. Said sections provide a complete procedure for authorization by the electors, the issuance, payment and retirement of county, school district and municipal bonds. No aid from Chapter 1 of said Title 52 is required to provide for such authorization, issuance, payment or retirement of said bonds. Section 5273 expressly requires that the call for the election shall set forth among other things the term of the bonds and the date of maturity of the bonds. Section 5274 says that the bonds shall be payable at a date not to exceed forty

Exhibit "C"—(Continued)

years from the date of their issuance. Section 5279 provides that the tax to be levied shall provide a fund for the redemption of the bonds when they mature and Section 5281 provides that when the bonds shall mature it shall be the duty of the county or city or town treasurer, [127] as the case may be, to give notice for four weeks in some newspaper, of the intention to redeem such bonds, and for the application of money on hand to such redemption. Clearly the provisions of these sections authorize the officials of the counties and municipalities, when so directed by the electors at an election, to make bonds payable at a definite maturity date without provision for prior call and when they have so issued bonds a contract has been entered into by the purchasers of these bonds with the county or municipality that cannot be set aside at a later date by either party because the exigencies of finance make it profitable to escape from the contract. That such a contract may be desirable for the sellers of the bonds for the reason that they will bring a better price than if subject to call at any time is pointed out by the courts in the following cases:

Fales vs. Multnomah County, 248 Pac. 151, 153.

State vs. Kansas City, 204 Pac. 690, 691.

Mitchell vs. Knox County Fiscal Court, 177 S.W. 279, 286.

In the *Fales* case, *supra*, the court says: [128]

“Callable bonds, sometimes called redeemable or

Exhibit "C"—(Continued)

optional bonds, which kind of school bonds are provided for by section 5062, Or. L., being the Act of 1913, 'redeemable at the pleasure of the (school) district but due and payable absolutely twenty years from date,' are denominated term bonds, which may be called for payment before their maturity. This is in order that the issuing municipality may redeem its indebtedness if it chooses to exercise the option, without being obliged to do so. Very few of such bonds are called for payment before their maturity. They do not sell at the same price as they would for the term without the optional feature, since, for the purpose of computing the selling price or basis, the bond is treated as running only to the optional date and not to maturity."

In the case of *State vs. Kansas City*, *supra*, the court says:

"* * * privilege of short-time prepayment operates in the sale of bonds as a discount of one-half of 1 per cent; and, if the city must write into proposed bonds privilege of prepayment, the aggregate loss on bond issues for the year 1922 will be about \$25,000."

In the *Mitchell* case, *supra*, the court says:

"It is well known that bonds which run for a specified long term, without being subject to redemption before their maturity bring a higher price than bonds that are subject to redemption before their maturity. On the other hand, it is to the in-

Exhibit "C"—(Continued)

terest of the county to have the right to redeem a long-term bond at any time before its maturity. Interest rates may fall, or the county may have funds on hand which it can conveniently apply to the payment of its debts. It is therefore usual, in bonds of this character, to make all or [129] some of them redeemable at some time before their maturity, and after they have run a reasonable length of time. This form tends to make them marketable, at a good price. Furthermore, the statute does not mean that the fiscal court must insert the redemption clause into all of its bonds, but merely that it has the power to do so, and that power involves the right to insert the redemption clause in some bonds, and omit it from others."

Proposition number 2, the second proposition above stated, to the effect that the provisions of Section 5252 of Chapter 1, Title 52, Civil Code of 1913, making it the duty of the Loan Commissioners to issue new bonds for the purpose of paying, redeeming and refunding indebtedness when the same can be issued at a lower rate of interest to the profit and benefit of the state, does not authorize the call and retirement of bonds bearing a definite maturity date, without provision for call and retirement, is established by a comparison of the provisions of said Section 5252 with Section 5253 immediately following. Section 5253 was adopted by the same legislature as adopted Section 5252, but at a later session. If said Section 5252 is to be construed as authorizing the retirement of bonds at any

Exhibit "C"—(Continued)

time whenever the interest rate is such as to make it profitable for the debtor, then the provision in Section 5253, reserving [130] to the state the right to redeem bonds at par after fifteen years, in their numerical order, is not only wholly unnecessary but is positively misleading to the purchasers of the bonds. In view of said Section 5253, Section 5252 must be construed as limiting the right to redeem and refund bonds consistent with Section 5253, that is, giving the right to refund only when the bonds have matured or are callable under the fifteen year provision or are being voluntarily surrendered by the holders thereof. That such is the proper construction of these two sections taken together, is clear from the case of *State ex rel Board of Fund Commissioners vs. Smith*, 96 S. W. (2) 348.

The language to be construed in that case was the following:

“The board of fund commissioners are hereby authorized and empowered to enter into contracts, and to refund any part of the bonded indebtedness of the state, whenever they can do so to the advantage of the state in change of time, terms of payment or interest payment upon the indebtedness which it is proposed to refund,”

and the court in construing the same said the following:

“Or, stated differently, if section 11500 authorizes the calling and redemption of any and all outstanding bonds at any time advantage will thereby result to the state, [131] and that section is to be read into

Exhibit "C"—(Continued)

all bonds issued subsequent to the enactment of that section, then all such bonds must certainly be option bonds of the character described in section 11499 and the latter section rendered meaningless. No such intention will be charged to the Legislature by the courts if it can be avoided. The only possible construction which can be given section 11500 which will not render section 11499 nugatory is that the former section applies only to the refunding of nonoption bonds at their stated maturity or by contractual agreement, and to the refunding of option bonds during the period of the option when advantage to the state will result. Such a construction is reasonable and in entire accord with the principle expressed by the General Assembly in the following introductory words of its Act of March 31, 1885: 'Whereas, the maintenance of the credit of the state is of the utmost importance and should ever be guarded with the most jealous care.' Laws 1885, p. 39.

"It is not only possible, but is very probable, that when the General Assembly authorized the fund commissioners to refund any part of the bonded indebtedness of the state, 'whenever they can do so,' etc., it was understood that bonds then outstanding, or which might thereafter be issued, containing the solemn promise of the state to pay interest at an agreed rate for a definite length of time, constituted such an insurmountable and clearly recognized obstacle to the changing of the contract without the agreement of both parties that it was not deemed

Exhibit "C"—(Continued)

necessary to incorporate the exception in the act.

"(3) The bonds herein involved, having a definite maturity date stated therein, containing the unqualified promise to pay interest at a stated rate for a definite length of time, and issued under constitutional authority containing as its only direction relative to maturity the words, 'and maturing not later than thirty-five (35) years from their date' (section 44d, art. 4, Const. see Laws Mo. 1933-34, Ex. Sess., p. 174), are not option bonds and cannot [132] be refunded, prior to maturity except by agreement. Since the bonds are not due and there is no agreement that they may be refunded, it necessarily follows that the Board of Fund Commissioners is without authority to issue refunding bonds for the purpose of refunding the present issue."

96 S. W. (2) 351.

Proposition number 3 above stated, to the effect that the provisions of Section 5253, Chapter 1 of Title 52, Arizona Civil Code of 1913, providing that the state reserves the right to redeem at par bonds in their numerical order fifteen years after date thereof, apply only to bonds issued by the State Loan Commissioners for state indebtedness and do not apply to bonds issued by the counties or municipalities, under the provisions of Chapter 2, Title 52, Civil Code 1913, is obvious. Sections 5251 and 5252 immediately preceding Section 5253 refer only to outstanding and existing indebtedness of the State of Arizona or the Territory of Arizona assumed by the state, and such state indebtedness as may be or

Exhibit "C"—(Continued)

is now authorized by law, and to subsisting state legal indebtedness, and the said Section 5253 refers to said bonds thereby clearly indicating Section 5253 applies to the bonds mentioned in the preceding two sections. Furthermore, a [133] comparison of the provisions of Section 5253 with Section 5273 in Chapter 2 of said Title 52 shows that Section 5253 is not intended to apply to county and municipal bonds, for the maximum rate of interest permitted by Section 5253 is 5% while Section 5273 permits a maximum of 6% for county and municipal bonds, and a comparison of Section 5253 with Section 5274 shows that the maximum term for bonds issued under Section 5253 is 25 years, while the maximum term for county and municipal bonds is forty years. Furthermore, the bonds mentioned in Section 5253 must be signed by the Loan Commissioners, while the county and municipal bonds issued under Section 5274 must be signed and attested when issued by the county by the chairman and clerk of the board of supervisors, when issued by school districts by chairman and clerk of the board of school trustees and must be countersigned by the chairman of the board of supervisors of the county, and when issued by a city or town must be signed by the mayor and city clerk of such city or town. A comparison of Section 5253 with Section 5260 further discloses the fact that the faith and credit of the state is pledged for the [134] payment of the bonds and the interest accruing thereon as to bonds issued under Section 5253, but as to county and municipal bonds

Exhibit "C"—(Continued)

refunded by the Loan Commissioners pursuant to Section 5260 payment of the bonds is required from the funds of the county, municipality or school district only. A comparison of Section 5253 with Section 5277 shows that the bonds referred to by Section 5253 must be registered by the State Auditor in a book to be kept by him for that purpose, and the county and municipal bonds issued in pursuance of Chapter 2 of Title 52 must be entered upon the record of proceedings of the governing body of the school district, city or town, or other municipal corporation disposing of the same.

It being thus clear that most of the provisions in Section 5253 cannot pertain to county and municipal bonds issued under Chapter 2 of Title 52. it is, indeed, a far stretch to contend that the provision for reservation of the right of redemption must be imported into the county and municipal bonds issued under Chapter 2, but even that provision reserving the right to redeem is inconsistent with Section 5281 found in Chapter 2, for said [135] provision to redeem in Section 5253 reserves the right to redeem after fifteen years from date of issue and Section 5281 provides for redemption when the bonds shall mature, and under Section 5274 of Chapter 2 county and municipal bonds may mature at any time from one to forty years after their date of issuance.

Proposition number 4 to the effect that the provision in Section 5260, in Chapter 1 of Title 52 of the Civil Code, 1913, authorizing the State Loan

Exhibit "C"—(Continued)

Commissioners, on demand from the board of supervisors or the proper authorities of municipalities or school districts, to provide for the redeeming or refunding of county municipal or school district indebtedness in the same manner as other state indebtedness, refers only to the procedure for refunding and does not write into county and municipal bonds issued under Chapter 2, Title 52, Civil Code, 1913, the reservation of the right to redeem bonds issued by the State Loan Commissioners, reserved to the state by section 5253 of Chapter 1 of said title 52, seems clear from the language used. Said section 5260 does not provide that counties, municipal- [136] ities and school districts shall reserve the right to redeem or refund their bonds at the same time or times that state bonds may be redeemed or refunded, but provides only that the "Loan Commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness upon the official demand of said authorities in the same manner as other state indebtedness and they shall issue bonds for any indebtedness now allowed or that may be hereafter allowed by law to said counties, municipalities or school districts upon official demand of said authorities." This language is not capable of being construed as making county and municipal bonds redeemable or callable at the time provided by Section 5253 for state bonds. It is well settled by the authorities that the phrase "In the same manner" is not applicable to substance but only to procedure

Exhibit "C"—(Continued)

and is the equivalent of saying by "similar proceedings so far as * * * applicable to the subject matter," *Commonwealth vs. Hildebrand*, 11 Alt. (2) 688. In this case the court said:

"The phrase 'in the same manner,' however, has a well-understood meaning in statutory construction and its restrictive or limiting [137] force applies not to substance, but to procedure only; it is the equivalent of saying 'by similar proceedings, so far as * * * applicable to the subject-matter.' *Wilder's S. S. Co. v. Low*, 9 Cir., 112 F. 161, 164, *Durousseau v. United States*, 6 Cranch 307, 317, 3 L. Ed. 232. If the legislature had intended that appeals under both sects. 404 and 410 should not only be held in the same manner, but should be subject to the same limitations of appellate review, it is probable that the legislature would have so indicated."

Proposition number 5, above stated, to the effect that the provisions of 5273 providing a date of maturity for bonds to be stated in the call for election and provisions of Section 5279 providing for the levy of a tax to pay said bonds until they mature, and the provisions of Section 5281 providing for the retirement of such bonds after maturity, cannot be held to have been repealed by the provisions for refunding and the provisions reserving the right to call bonds contained in Sections 5252 and 5253, Chapter 1 of said Title 52, is very clear for several reasons. In the first place as has been pointed out, the provisions in Chapter 2 refer to an entirely

Exhibit "C"—(Continued)

different kind of bond than do the provisions in Chapter 1.

In the second place, no express repeal being made, an implied repeal will not be pre- [138] sumed, unless the two provisions cannot stand together. *Southern Pacific Company v. Gila County*, 109 Pac. (2) 610, in which case this court quotes the rule laid down in its former decisions, as follows:

"It should also be borne in mind that repeals by implication are not favored and will not be indulged if there is any other reasonable construction."

Furthermore, while the main portion of Chapter 2, Title 52, Civil Code 1913, first originated in Chapter 29 Session Laws 1912, Regular Session, and the main provisions of Chapter 1, Title 52, Civil Code of 1913, first originated in Chapter 29 of Session Laws of 1912, First Special Session, yet some of the provisions in said Chapter 2 were first enacted by Chapter 22, Session Laws of 1913, Third Special Session, so it is hard to say which of the two chapters is the later enactment. Be that as it may, the later act did not comply with the constitutional provision for amending the prior act and, hence, ought not to be construed as having the effect of amending the prior act, if that can be avoided. *State vs. Kansas City*, 204 Pac. 690, 691. Lastly, the provisions of all of the original acts were inserted in the revisions of 1913 and 1928 [139] and by reason of such insertion in such revisions both chapters must be given effect as far as possible on the

Exhibit "C"—(Continued)

presumption that the legislature intended that each should be preserved to operate in its particular field.

Sou. Pac. R. R. Co. v. Gila County, 109
Pac. (2) 610, 611.

Proposition number 6 stated above, to the effect that while it is the duty of the Loan Commissioners to proceed to refund county bonds on the request of the county under the provisions of Section 5260, Chapter 1, Title 52, Civil code of 1913, the mandate cannot issue in this case because Maricopa County does not show that it has any bonds to be refunded as the bonds in question are not yet due and are not subject to call before maturity, necessarily follows from what has been stated above under the five preceding propositions. It is obvious from the present rate of interest on municipal bonds and from the allegations of the plaintiff's complaint that the holders of the bonds in question will not voluntarily surrender them at the present time and if the views we have above expressed are correct, said bonds are not callable or redeemable until their respective dates of maturity, as [140] such dates were approved by the electors at the election and as they were definitely fixed in the bonds in pursuance of Chapter 2, Title 52, Civil Code of 1913, under which they purport to be issued, and were in fact issued. If we are right in our construction of the statutes involved, Maricopa County has no more right to compel the holders of these bonds to accept present payment merely because the county can save money by doing so than the bondholders had the

Exhibit "C"—(Continued)

right a few years ago when the county was delinquent in its payments, to compel the county to issue longer term bonds at a lower rate of interest as the bondholders then thought for their best interest. Maricopa County then saw fit to stand on its contract as it was written and we believe the bondholders likewise have the right to stand on the same contract.

Proposition number 7, to the effect that mandamus should not issue to require the Loan Commissioners to proceed under the provisions of Section 5260, Chapter 1, Civil Code of 1913, until Maricopa County has established its right to call the bonds in question by appropriate proceedings against the bondholders, [141] seems obviously a correct statement of law relating to mandamus. The rule repeatedly stated by this court and other courts is unqualifiedly to the effect that mandamus will not issue to compel a public officer to perform an act unless it is his clear duty to do so. *Miners & Merchants Bank vs. Herron*, 46 Ariz. 71, 80; 34 American Jurisprudence Sec. 36, p. 831. If the peremptory writ should issue the Loan Commissioners would be obliged to proceed to issue the refunding bonds. The bondholders, not being bound by this proceeding, would naturally refuse to exchange their bonds and would unquestionably resort to the courts, State or Federal, to establish their contention. Assuming that this court would consider itself bound by a decision made in this case in which most of the bondholders, except the one that we represent, will have had no opportunity for a hearing, the Federal

Exhibit "C"—(Continued)

courts, of course, will not consider themselves so bound and the rule of *Erie v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, not applying by reason of a right under the Federal Constitution being involved, the Federal courts will be obliged [142] to construe the statutory provisions in question independently of any determination made by this court. *Jackson County vs. United States*, 308 U. S. 343, 84 L. Ed. 313, 316. The result will be that the Loan Commissioners will have been forced into a long period of litigation by the mandate of this court. We do not believe that this court has the power to issue the writ under those circumstances.

If Maricopa County desires to refund these bonds, there is no obstacle under the provisions of the declaratory judgment act and rules 18a and 23a (Secs. 21-507, 21-524 Ann. Code 1939) of the rules of civil procedure to its bringing an appropriate proceeding against the bondholders to determine their rights under the bonds, which they hold and if it shall be determined in such proceeding that the bonds in question are callable, we do not believe a mandate against the Loan Commissioners will be necessary.

Respectfully submitted,

GUST, ROSENFELD, DIVELBESS,
ROBINETTE AND COOLIDGE.

201 Professional Building, Phoenix,
Arizona,

By J. L. GUST [143]

EXHIBIT "B"

MINUTES OF A MEETING OF THE LOAN
COMMISSIONERS OF THE STATE OF
ARIZONA

A meeting of the Loan Commissioners of the State of Arizona was held pursuant to the foregoing consent to said meeting in the office of the Governor of the State of Arizona, at the Capitol Building, in the City of Phoenix, within the said State of Arizona, at 3:00 o'clock P.M. on the 10th day of February, 1943.

The following, constituting all the members of the Loan Commissioners of the State of Arizona, were present:

Sidney P. Osborn,	Governor
Ana Frohmiller,	State Auditor
J. D. Brush,	State Treasurer

The Governor announced that the Loan Commissioners were convened in meeting for the purpose of considering the bid of Bank of America National Trust & Savings Association, Boettcher and Company and R. E. Moulton & Company, which was filed and submitted to the Loan Commissioners of the State of Arizona by said bidders on February 1, 1943, whereby said bidders bid for \$4,100,000 refunding bonds of the State of Arizona as described and offered for sale in that certain call for bids authorized by the Loan Commissioners of the State of Arizona pursuant to a resolution adopted on November 19, 1942.

Following the discussion and consideration of said bid of Bank of America National Trust & Savings Association, Boettcher and Company and R. H. Moulton & Company, [144] Commissioner Brush offered and moved the adoption of the following resolution:

“RESOLUTION OF THE LOAN COMMISSIONERS OF THE STATE OF ARIZONA SELLING \$4,100,000 PRINCIPAL AMOUNT OF REFUNDING BONDS TO BE ISSUED FOR THE PURPOSE OF REDEEMING A LIKE PRINCIPAL AMOUNT OF BONDS OF MARICOPA COUNTY, ARIZONA; PROVIDING FOR THE REDEMPTION OF OUTSTANDING BONDS OF MARICOPA COUNTY AGGREGATING THE PRINCIPAL AMOUNT OF \$4,100,000; SETTING ASIDE THE PROCEEDS OF THE SALE OF STATE OF ARIZONA REFUNDING BONDS FOR THE PURPOSE OF REDEEMING SAID BONDS OF MARICOPA COUNTY AND DIRECTING NOTICE OF SUCH REDEMPTION TO BE GIVEN

Whereas, the Loan Commissioners of the State of Arizona, heretofore, to-wit, on November 19, 1942, authorized the issuance of \$4,100,000 principal amount State of Arizona Refunding Bonds and directed notice of sale thereof to be given; and

Whereas, such notice of the sale of said Refunding Bonds has been duly given and published and at the

Exhibit "B"—(Continued)

time and place fixed for the receipt of bids, the Loan Commissioners duly met to consider all bids received for the purchase of said bonds and to take such action thereon as might be deemed advisable; and

Whereas, Bank of America National Trust & Savings Association, Boettcher and Company, and R. H. Moulton and Company, duly filed their bid for the purchase of said bonds at the price of par and a premium accompanied by a cashier's check on the First National Bank of Arizona, which is a member bank of the Federal Reserve System, [145] payable to the Treasurer of the State of Arizona in the sum of \$205,000; and

Whereas, said bid for the purchase of said bonds and the bidders' good faith check accompanying the same are satisfactory and in accordance with law and the Board of Supervisors of Maricopa County has, by resolution determined that said bid is satisfactory and should be accepted; and

Whereas, it appears that said bid should be accepted and said bonds awarded as in this resolution provided;

Now, Therefore, Be It Resolved by the Loan Commissioners of the State of Arizona, as follows:

Section 1. Refunding Bonds of the State of Arizona in the aggregate principal amount of \$4,100,000 are hereby awarded and sold to Bank of America National Trust & Savings Association, Boettcher and Company, and R. H. Moulton and

Exhibit "B"—(Continued)

Company in accordance with and subject to the terms and conditions of their said bid as follows, to-wit:

‘February 1, 1943

‘Loan Commissioners of the State of Arizona

Phoenix, Arizona

Gentlemen:

For all, but not less than all of \$4,100,000.00 par value legally issued State of Arizona Refunding Bonds to be dated as of the date of their issuance, [146] to bear interest at the rate of $2\frac{3}{4}$ per cent per annum, payable semiannually January 15 and July 15, of the denomination of \$1,000.00 each, numbered from 1 to 4100, both inclusive, and maturing \$300,000.00 principal amount on July 15 in each of the years 1944 to 1956, both inclusive, and \$200,000.00 on July 15, 1957, all in accordance with your published notice of sale, we bid you the sum of par and accrued interest to date of delivery, together with a premium of \$800.00. We further agree as part of the purchase price that we will waive interest on the Refunding Bonds from the date of their issue to April 15, 1943, this concession on our part being made for the purpose of enabling you to complete the proceedings for the call and redemption of the outstanding bonds of Maricopa County to the end that double interest will not accrue on both the Refunding Bonds and the outstanding Maricopa County bonds. This bid is subject to the following conditions, each of which is hereby made a condition precedent to any liability on our part.

Exhibit "B"—(Continued)

(1) That this bid shall be accepted promptly, and notice thereof given to us, in no event later than 5:00 o'clock P.M., Pacific War Time, February 10, 1943.

(2) That said Refunding Bonds shall be duly executed and delivered to us on payment of the purchase price therefor not later than 12:00 o'clock Noon, Pacific War Time, March 15, 1943.

(3) That in the event that prior to the delivery of said Refunding Bonds to us the income received by private holders from bonds of the same type and character shall be taxable or subjected to tax or be declared to be taxable by the terms of any Federal Income Tax law either by ruling of the Bureau of Internal Revenue or by decision of any Federal Court or by amendment of the Federal Income Tax laws or otherwise, we may at our election be relieved of our obligations under this agreement to purchase said bonds.

(4) The Loan Commissioners of the State of Arizona and the Board of Supervisors of Maricopa County, State of Arizona, will adopt such proceedings and take such action [147] as may legally be required for the purpose of calling and redeeming the outstanding \$4,100,000.00 principal amount of bonds of the County of Maricopa proposed to be refunded from the proceeds of the issuance and sale of said Refunding Bonds of the State of Arizona and that such outstanding bonds of the County of Maricopa to the amount aforesaid will be called and redeemed from the proceeds of the sale of said Re-

Exhibit "B"—(Continued)

funding Bonds (which shall be used for no other purpose) and that interest on said bonds of the County of Maricopa will cease from and after the date fixed for such redemption.

(5) That you will furnish us with a full, true and correct transcript of the proceedings for the issuance of said Refunding Bonds duly certified on the basis of which we will be able to secure at our own expense, at or before the delivery of said Refunding Bonds to us, the unqualified legal opinion of Messrs. Orrick, Dahlquist, Neff & Herrington of San Francisco approving the legality of the proceedings for the issuance of said Refunding Bonds and the proceedings taken or to be taken for the call and redemption of a like principal amount of outstanding bonds of Maricopa County, State of Arizona, in all respects. If our said attorneys are unable to render their opinion approving the legality of said Refunding Bonds and said proceedings for the redemption of said outstanding bonds of Maricopa County in all respects, this bid is to be deemed cancelled and we are to be relieved from all liability hereunder, with like force and effect as though this bid had not been made.

We hand you herewith cashiers check of the First National Bank of Arizona, which is a member bank of the Federal Reserve System, in the sum of \$205,000.00 payable to the order of the State Treasurer of the State of Arizona, to be held in accordance with your advertised notice of the sale of said bonds, but to be returned to us uncashed in the

Exhibit "B"—(Continued)

event you are unable to comply with each and all of the conditions precedent [148] above specified.

Very truly yours,

BANK OF AMERICA NATIONAL
TRUST & SAVINGS ASSOCIA-
TION

BOETTCHER and COMPANY

R. R. MOULTON and COMPANY

By FRANCES MOULTON'

Section 2. This award and the sale of said Refunding Bonds is made subject to the following conditions to which said successful bidders have consented and agreed, to-wit:

The Loan Commissioners shall have the right to deliver said Refunding Bonds to said bidders subsequent to March 15, 1943 if it proves to be impracticable to print, lithograph or execute said bonds prior to said date, or to make delivery thereof prior to said date by reason of litigation or any other cause whatsoever, and any delivery of said bonds made subsequent to said date shall constitute good delivery thereof in accordance with said notice of sale, provided all other terms and conditions of said bid shall have been duly complied with.

Said purchasers shall have the right upon five days written notice to the Loan Commissioners to terminate said extended period of delivery and require that delivery of said bonds be made to them not later than five days from the date of said notice. If such delivery of said bonds is not so made to said purchasers by the State Treasurer or the Loan

Exhibit "B"—(Continued)

Commissioners within the [149] said period of five days from the date of said notice, this sale shall be deemed cancelled and both the Loan Commissioners and said purchasers shall be relieved of all obligations one to the other. The Loan Commissioners shall be under no liability for damages for failure to deliver said bonds to said purchasers in the event of cancellation of this sale nor shall said purchasers be under any liability to the Loan Commissioners or the State of Arizona. In the event of such cancellation of this sale the good faith check of \$205,000 deposited by said bidders shall be promptly returned to said bidders.

Section 3. Forthwith upon the payment into the state treasury of the proceeds of the sale of said \$4,100,000 principal amount of State of Arizona Refunding Bonds, the state treasurer shall apportion them to a special fund which is hereby designated the "Maricopa County Highway Bond Redemption Fund." Out of the moneys in said Maricopa County Highway Bond Redemption Fund the state treasurer shall pay a like principal amount of \$4,100,000 of bonds of Maricopa County designated and referred to in the resolution of the Loan Commissioners adopted November 19, 1942, which is hereby referred to and by reference incorporated herein and made a part hereof. [150]

Section 4. The Board of Supervisors of Maricopa County and the county treasurer thereof shall cause to be deposited with the state treasurer in a special fund which is hereby designated the "Mari-

Exhibit "B"—(Continued)

copa County Highway Bond Interest Fund," the amounts necessary to pay interest on the bonds of Maricopa County called for redemption, from the last interest payment date to the date of redemption. The moneys in said Maricopa County Highway Bond Interest Fund shall be used and applied by the state treasurer for the payment of interest from the last ensuing interest payment date to the date of redemption of said Maricopa County bonds.

Section 5. Forthwith upon the deposit of said proceeds of sale of said State of Arizona Refunding Bonds in said Maricopa County Highway Bond Redemption Fund and said interest moneys in said Maricopa County Highway Bond Interest Fund, it is hereby found and determined that there will be in the state treasury of the State of Arizona a sum sufficient for the redeeming of said outstanding bonds of Maricopa County, State of Arizona, for the redemption of which said State of Arizona refunding bonds are authorized to be issued.

Section 6. Upon the deposit of the funds as provided in Section 5 hereof, the state [151] treasurer of the State of Arizona is hereby authorized and directed to call for redemption and to redeem all of the outstanding bonds of Maricopa County more particularly described in the Notice of Redemption hereinafter set forth. The state treasurer shall cause notice of such call for redemption to be published at least two (2) consecutive times in the "Arizona Weekly Gazette," a newspaper published in the City of Phoenix, the state capitol of the State of Arizona, and in addition thereto

Exhibit "B"—(Continued)

said state treasurer shall cause said notice to be published once a week for one (1) month in three (3) newspapers published in the State of Arizona (no two of which shall be published in the same county), and such notice shall be published in the "Chandler Arizonan," a newspaper published and circulated in the County of Maricopa, State of Arizona, and in the "Nogales International," a newspaper published and circulated in the County of Santa Cruz, State of Arizona, and in the "Casa Grande Dispatch," a newspaper published and circulated in the County of Pinal, State of Arizona. In addition to such publications in the State of Arizona, which are hereby declared to be sufficient and to constitute adequate public notice of such call for redemption, the state treasurer is hereby authorized to [152] cause such Notice of Redemption to be published once in "The Bond Buyer," a publication in the City and State of New York and of general circulation throughout the United States of America among dealers in municipal bonds, and institutions and individuals investors holding municipal bonds, and, also, to cause such Notice of Redemption to be published once in the "Wall Street Journal, Pacific Coast Edition," a newspaper published in the City and County of San Francisco, State of California, and of general circulation throughout the Pacific Coast of the United States among municipal bond dealers, investors and institutional holders of municipal bonds; but no error or informality in such publication in said newspapers published in New York and San Francisco,

Exhibit "B"—(Continued)

respectively, or failure of publication in either or both thereof, shall affect the validity of such call for redemption, provided that notice thereof be published in said newspapers in the State of Arizona for the periods above specified. Said state treasurer is further authorized to cause a copy of such advertised Notice of Redemption to be mailed to Bankers Trust Company of the City of New York, State of New York, and to each bank or trust company or paying agent at which the interest on said bonds of Maricopa County hereby called for redemption was made payable.

Section 7. Said notice of call for redemption shall be substantially in the following form: [153]

NOTICE OF REDEMPTION
MARICOPA COUNTY STATE OF ARIZONA
HIGHWAY BONDS

Notice Is Hereby Given, that pursuant to law and the proceedings of the Board of Supervisors of Maricopa County and the Loan Commissioners of the State of Arizona, all of the following described bonds of Maricopa County, State of Arizona are hereby called for redemption and will be paid on
....., 1943, to-wit:

Name of Bond	Date of Issue	Bond Numbers (all inclusive)
Maricopa County Highway Bonds	June 15, 1919	2301 to 4000
Maricopa County Highway Bonds	January 15, 1921	6101 to 8500
Said bonds will be redeemed at the face amount		

Exhibit "B"—(Continued)

thereof and accrued interest thereon to and including....., 1943. Said bonds hereby called for redemption must be surrendered on said redemption date (with all interest coupons maturing subsequent to said redemption date) at the office of the state treasurer of the State of Arizona, Capitol Building, Phoenix, Arizona, for payment and cancellation. If any of said bonds hereinabove numbered and described are not presented for payment and cancellation thirty (30) days after the first publication of this notice, to-wit, on or [154] before....., 1943, interest on all such bonds will cease from and after said date.

This notice is given pursuant to proceedings of the Loan Commissioners of the State of Arizona and the concurrent action of the Board of Supervisors of Maricopa County, State of Arizona, adopting and ratifying the same.

Dated, Phoenix, Ariz,, 1943.

State Treasurer of the State
of Arizona

County Treasurer of Mari-
copa County, State of Ari-
zona.

Section 8. If the state treasurer has knowledge of the names and addresses of the holders of any of said bonds hereby called for redemption, said state treasurer is further authorized and directed to de-

Exhibit "B"—(Continued)

posit in the United States Post Office at Phoenix, Arizona, a copy of the foregoing notice of call for redemption, enclosed in a sealed envelope with postage thereon prepaid, addressed respectively to such owner or owners whos names and addresses are known to said state treasurer, each of which notices shall be mailed, as above provided, by depositing the same in the United States Post Office at least thirty (30) days prior to said last mentioned redemption date. [155]

Section 9. Whenever such outstanding bonds of Maricopa County hereby called for redemption are presented for payment, the state auditor shall endorse on each bond the amount due thereon and shall write across the face of each bond the date of its surrender and the name of the person surrendering the same and shall keep proper record thereof, and when the state treasurer pays any of said bonds of Maricopa County so called for redemption, he shall cancel such bonds by perforating the same and indorsing thereon by writing or stamping in ink the words "Redeemed and Cancelled", with the date of concellation, and shall thereupon cause said bonds so cancelled to be delivered to the county treasurer of Maricopa County, who shall give his receipt therefor, and such receipt shall be full acquittance to the state treasurer and the state auditor of the State of Arizona for the application of the moneys in the Redemption Fund hereinabove specified, used and applied for the purpose of redeeming said bonds of Maricopa County.

Exhibit "B"—(Continued)

Section 10. This resolution shall take effect immediately.

Passed and Adopted by the Loan Commissioners of the State of Arizona, on this 10th [156] day of February, 1943.

SIDNEY P. OSBORN

Governor

ANA FROHMILLER

State Auditor

J. D. BRUSH

State Treasurer

Loan Commissioners of the State of Arizona."

The foregoing motion was seconded by Commissioner Frohmiller, whereupon the motion was adopted by the affirmative vote of all the members of the Loan Commissioners of the State of Arizona, voting as follows:

Sidney P. Osborn, Governor	Yes
Ana Frohmiller, State Auditor	Yes
J. D. Brush, State Treasurer	Yes

The Governor thereupon declared that the foregoing resolution had been unanimously adopted by the Loan Commissioners of the State of Arizona.

There being no further business to come before the meeting, upon motion duly made and seconded, the meeting was adjourned.

State Treasurer

Received April 29, 1943

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& COOLIDGE

[Endorsed]: Filed Apr 29 1943. [157]

In the United States District Court
For the District of Arizona

No. Civil 379

Phoenix

STATE OF WASHINGTON and EQUITABLE
LIFE INSURANCE COMPANY OF IOWA,
Plaintiffs,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED
OGLESBY and PHIL ISLEY, constituting
the Board of Supervisors of Maricopa County,
Arizona; SIDNEY P. OSBORN, Governor,
ANA FROHMILLER, State Auditor, and
DAN E. GARVEY, State Treasurer, constitut-
ing the Loan Commissioners of the State of
Arizona; DAN E. GARVEY, State Treasurer,
and ANA FROHMILLER, State Auditor of
the State of Arizona,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT UNDER RULE 56

State of Arizona,

County of Maricopa.—ss.

Earl Anderson, being first duly sworn, deposes
and says:

1. That he is now and was at all the times herein mentioned, and is now, the Chief Assistant Attorney General of the State of Arizona; that in such capacity he is personally familiar with the facts attendant upon the indebtedness of the County of Maricopa in the principal amount of \$4,100,000 of Maricopa County Highway Bonds. That in such capacity he is personally familiar with the powers and duties of the Loan Commissioners of the State of Arizona, said Commissioners being Sidney P. Osborn, Governor of the State of Arizona; Ana Frohmiller, State [158] Auditor of the State of Arizona, and J. D. Brush, State Treasurer of the State of Arizona, in respect of funding, refunding, and redeeming the indebtedness of said State of Arizona, counties, cities, and other municipalities of said State of Arizona, the laws and statutes of said state in relation thereto.

2. That on July 7, 1941, the Board of Supervisors of Maricopa County passed and adopted a resolution officially demanding that the defendants herein, as the Loan Commissioners of the State of Arizona, redeem and refund issued and outstanding Maricopa County Highway Bonds in the aggregate principal amount of \$4,900,000, which aggregate principal amount was outstanding as of said July 7, 1941.

3. That on November 7, 1941, said Loan Commissioners informed the Board of Supervisors of Maricopa County, in writing, that they were unauthorized to refund said outstanding indebtedness of Maricopa County as demanded by Maricopa

County, as aforesaid, and said Loan Commissioners did thereupon refuse to redeem and refund said outstanding Highway Bonds of Maricopa County or to provide for the refunding thereof, and thereupon, to-wit, on February 2, 1942, Maricopa County filed an original action in mandamus in the Supreme Court of the State of Arizona entitled: "Maricopa County, a Municipal Corporation, Plaintiff, vs. Sidney P. Osborn, Governor of the State of Arizona, Ana Frohmiller, State Auditor, and Joe Hunt, State Treasurer, constituting the Loan Commissioners of the State of Arizona, Defendants," No. 4489, to command said Loan Commissioners to redeem and refund said outstanding indebtedness of Maricopa County notwithstanding the refusal of said Loan Commissioners so to do.

4. That said original action filed in the Supreme [159] Court of the State of Arizona, duly came on for hearing and decision, and on May 4, 1942, said court duly rendered and entered its judgment making peremptory the alternative writ of mandamus which had theretofore issued in said action; and by said peremptory writ of mandamus said Loan Commissioners were commanded to redeem said outstanding indebtedness of Maricopa County. That said decision is reported in Ariz..... and 125 P. (2d) 703, and holds and determines that Maricopa County Highway Bonds, herein the subject of litigation, are and were at all times subject to redemption and refunding prior to their respective fixed maturity dates by said Loan Commissioners of the State of Arizona. That

for this reason said Loan Commissioners were commanded to redeem said outstanding indebtedness of Maricopa County by the issuance of said peremptory writ of mandamus.

5. That pursuant to said peremptory write of mandamus issued from the Supreme Court of the State of Arizona, said Loan Commissioners duly passed and adopted a resolution authorizing the issuance of refunding bonds of the State of Arizona for the purpose of redeeming said Maricopa County Highway Bonds then outstanding. That through proceedings duly and regularly taken under the laws of the State of Arizona, due notice was given and bids were called for by said Loan Commissioners for the purchase of refunding bonds of the State of Arizona in the principal amount of \$4,100,000. That the Loan Commissioners of the State of Arizona on February 10, 1943, accepted the joint bid of, and awarded the purchase of said refunding bonds to, Bank of America National Trust and Savings Association, Boettcher and Company, and R. H. Moulton & Company.

6. That notwithstanding said award and sale of said State of Arizona Refunding Bonds, said Loan Commissioners, on [160] February 12, 1943, advised the Board of Supervisors of Maricopa County, in writing, as such Loan Commissioners, that they would not execute or deliver any of said refunding bonds, and said Loan Commissioners refused to execute or deliver any of said State of Arizona Refunding Bonds to said purchasers.

7. That thereupon, to-wit, on March 4th, 1943, Maricopa County filed a second original action in mandamus in the Supreme Court of the State of Arizona entitled: "Maricopa County, a body politic and corporate, plaintiff, vs. Sidney P. Osborn, Governor of the State of Arizona; Ana Frohmiller, State Auditor of the State of Arizona, and J. D. Brush, State Treasurer of the State of Arizona, constituting the Land Commissioners of the State of Arizona, defendants," No. 4606, to command said defendants as and constituting the Loan Commissioners of the State of Arizona to execute and deliver said refunding bonds to the purchasers thereof. That said Loan Commissioners duly appeared and made return in said proceedings and filed briefs therein. That said action in said Supreme Court of the State of Arizona duly came on for hearing and decision, and on April 12, 1943, said Court duly rendered and entered its judgment making peremptory the alternative writ of mandamus which had theretofore issued in said action. That in said decision said Court reaffirmed its judgment in said prior original mandamus proceeding brought by Maricopa County in the case of Maricopa County v. Osborn, et al, (1942) Ariz....., 125 P. (2d) 703, and held and determined that said outstanding Maricopa County Highway Bonds are and were at all times subject to redemption and refunding by the Loan Commissioners of the State of Arizona prior to their respective fixed maturity dates. That for this reason said peremptory writ of mandamus was issued

by said Supreme Court of the State of Arizona [161] to command said Loan Commissioners of the State of Arizona to execute and deliver State of Arizona Refunding Bonds in the principal amount of \$4,100,000 to the purchasers thereof.

8. That said decisions of the Supreme Court of the State of Arizona are valid and conclusive adjudications to the effect that Maricopa County Highway Bonds are redeemable and refundable prior to their maturity dates under the laws of the State of Arizona. That said decisions are binding and conclusive on defendants as Loan Commissioners of the State of Arizona making it their legal duty to redeem and refund said outstanding indebtedness of the County of Maricopa by the issuance of State of Arizona Refunding Bonds.

9. That by virtue of the decision of the Supreme Court of the United States in the case of *Erie R. R. Co. v. Tompkins* (1938) 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 118, these decisions of the Supreme Court of Arizona finally establishing the law of the State of Arizona, as affiant verily believes, are binding and conclusive upon this court in respect of the issues raised in this action.

EARL ANDERSON

Subscribed and sworn to before me this 28th day of April, 1943.

[Seal]

AGNES WESTRA

Notary Public

My Commission will Expire: July 2, 1943.

[Endorsed]: Filed Apr 29 1943. [162]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

J. L. Gust, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the plaintiffs in the above entitled cause;

That he has made an examination of the file containing the Acts of the Third Special Session of the First Legislature of the State of Arizona in the Office of the Secretary of State of said State of Arizona, and that he finds in said file the original of the Acts passed by said Legislature at said session, numbered Chapter 20, Third Special Session, First Legislature, and Chapter 64, Third Special Session, First Legislature, and that he has had the Secretary of State of the State of Arizona provide him with certified copies of said Acts, which are attached hereto and made a part hereof.

Affiant further states that said file of the Third Special Session of the First Legislature of the State of Arizona in the Secretary of State's office contains neither the whole nor any part of Chapter 1, Title 52, Arizona Revised Statutes, 1913, entitled "Funding and Refunding";

That affiant has also examined the file of the Acts of the First Special Session of the First Legislature (Session Laws 1912) [163] in the Secretary of State's office and finds among the same Sections

5251, 5252, 5254, 5255, 5256, 5257, 5258, 5259, 5260, 5261, 5262, 5263 and 5264 of said Chapter 1, Title 52 of the Arizona Revised Statutes of 1913.

Affiant further states that he has examined also the Acts of the Second Special Session of the First Legislature in the Secretary of State's office and finds among the same an Act designated as Chapter 2, Laws of 1913, Second Special Session, which is Section 5253 of the Revised Statutes of 1913 and, further, an Act designed as Chapter 50, Laws of 1913, Second Special Session, which is Chapter 5265, Arizona Revised Statutes of 1913.

J. L. GUST.

Subscribed and sworn to before me this 17th day of May, 1943.

[Seal] HAROLD L. DIVELBESS.

My Commission Expires Dec. 27th, 1944. [164]

State of Arizona
Office of the Secretary

United States of America,
State of Arizona—ss.

I, Dan E. Garvey, Secretary of State, do hereby certify that the hereto attached is a true, correct and complete copy of Senate Bill No. 29, Chapter 20, Third Special Session, First Legislature, State of Arizona, entitled:

“AN ACT—ENABLING COUNTIES, SCHOOL
DISTRICTS, CITIES, TOWNS, AND

OTHER MUNICIPAL CORPORATIONS TO BECOME INDEBTED IN AN AMOUNT EXCEEDING FOUR PER CENTUM OF THE TAXABLE PROPERTY THEREIN; TO PROVIDE FOR ELECTIONS THEREFOR; TO PERMIT COUNTIES, SCHOOL DISTRICTS, CITIES, TOWNS, AND OTHER MUNICIPAL CORPORATIONS TO ISSUE BONDS FOR SUCH INDEBTEDNESS, AND TO PROVIDE FOR THE MANNER OF THE EXPENDITURE OF THE PROCEEDS OF SUCH BONDS, THE PAYMENT OF INTEREST THEREON, AND THE REDEMPTION THEREOF: TO PROVIDE FOR THE CREATION OF INDEBTEDNESS BY INCORPORATED CITIES AND TOWNS FOR SUPPLYING WATER, ARTIFICIAL LIGHT, AND SEWERS WHEN THE WORKS FOR SUCH WATER, ARTIFICIAL LIGHT, AND SEWERS WHICH ARE OR SHALL BE OWNED OR CONTROLLED BY THE MUNICIPALITY, AND FOR THE REPEAL OF ALL ACTS OR PARTS OF ACTS IN CONFLICT HEREWITH."

All of Which Is Shown by the Original Act as Passed by the Legislature and on File in This Department.

In Witness Whereof I have hereunto set my hand and affixed the Great Seal of the State of Ari-

zona. Done at Phoenix, the capital, this 13th day of May, A.D. 1943.

[Great Seal of the State of Arizona.]

(Signed) DAN E. GARVEY,
 Secretary of State. [165]

S. B. 29

AN ACT

ENABLING COUNTIES, SCHOOL DISTRICTS, CITIES, TOWNS, AND OTHER MUNICIPAL CORPORATIONS TO BECOME INDEBTED IN AN AMOUNT EXCEEDING FOUR PER CENTUM OF THE TAXABLE PROPERTY THEREIN; TO PROVIDE FOR ELECTIONS THEREFOR; TO PERMIT COUNTIES, SCHOOL DISTRICTS, CITIES, TOWNS, AND OTHER MUNICIPAL CORPORATIONS TO ISSUE BONDS FOR SUCH INDEBTEDNESS, AND TO PROVIDE FOR THE MANNER OF THE EXPENDITURE OF THE PROCEEDS OF SUCH BONDS, THE PAYMENT OF INTEREST THEREON, AND THE REDEMPTION THEREOF; TO PROVIDE FOR THE CREATION OF INDEBTEDNESS BY INCORPORATED CITIES AND TOWNS FOR SUPPLYING WATER, ARTIFICIAL LIGHT, AND SEWERS WHEN THE WORKS FOR SUCH WATER, ARTIFICIAL LIGHT AND SEWERS WHICH ARE OR SHALL BE OWNED OR CONTROLLED BY THE MUNICIPALITY AND FOR THE REPEAL OF ALL ACTS OR PARTS OF ACTS IN CONFLICT HEREWITH.

Be It Enacted by the Legislature of the State of
Arizona :

Title 12

Bond Issue by Counties, Cities, Towns and School
Districts for the Purpose of Making Public
Improvements.

Sec. 1 ; Act 29, Page 61, Laws 1912.

Sec. 1. Whenever it is attempted to increase the aggregate amount of the indebtedness of any county, school district, city, town, or other municipal corporation, so as to exceed four per centum of the value of the taxable property in such county, school district, city, town, or other municipal corporation, such value of taxable property therein to be ascertained by the last assessment for state and county purposes previous to such proposed incurring of such indebtedness, such county, school district, city, town, or other municipal corporation may become indebted in an amount exceeding four per centum of the value of such taxable property in the manner and by compliance with the provisions of this title.

Sec. 2 id.

Sec. 2. Any county, school district, city, town, or other municipal corporation, acting through its [166] board of supervisors, board of school trustees, city or town council, or the governing body of any other municipal corporation, may, of its own volition, and must upon petition signed by fifteen per centum of the property tax-payers, who shall in all other respects be qualified electors, in said county, school district, city, town, or other municipal corporation, or-

der an election by the property tax-payers, who in all other respects shall be qualified electors, in such county, school district, city, town, or other municipal corporation, for the purpose of determining whether such indebtedness shall be authorized; provided that the order for the election in any school district shall be made by the board of supervisors in the county where such election shall be held, either upon such petition, or upon request of the board of school trustees.

Sec. 3, *id.*

Sec. 3. At any election so held, if a majority of the property tax-payers, who must also, in all respects, be qualified electors, therein voting at said election, in such county, school district, city, town, or other municipal corporation, shall vote in favor of the creation of an indebtedness in an amount exceeding four per centum of the value of the taxable property in such county, school district, city, town or other municipal corporation, such value to be ascertained as provided in the first section of this title, such county, school district, city, town, or other municipal corporation shall be permitted to become indebted in an amount exceeding four per centum of the value of taxable property therein; provided, that in incorporated cities and towns the value of taxable property herein mentioned shall be taken from the last assessment for city or, town purposes made previous to incurring such indebtedness; and, provided, further, that any incorporated city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding fifteen per centum addi-

tional, for supplying such city or town with water, artificial light, or sewers, when the works for supplying such water, light, or sewers [167] are or shall be owned and controlled by the municipality.

Sec. 4, *id.*

Sec. 4. Whenever the board of supervisors, board of school trustees, city or town council, or the governing body of any other municipal corporation, shall order an election for the purpose herein provided, it shall be the duty of said board of supervisors, board of school trustees, city or town council, or the governing body of any other municipal corporation, to order such election to be held at the regular voting place, or places, within the limits of said county, school district, city, town, or other municipal corporation, wherein such indebtedness is attempted to be created, not less than thirty nor more than sixty days from the date of said order; provided, whenever an election shall be held for the purpose of creating an indebtedness by a county, or school district, such order shall be made by the board of supervisors of the county wherein such election shall be held.

The order thus made shall prescribe the object of such election, as prescribed in the eighth section of this title, and shall be held to be *prima facie* evidence that all of the provisions necessary to give it validity or qualify such board of supervisors, city or town council, or the governing body of any other municipal corporation, to make such order have been fully complied with.

Sec. 5, *id.*

Sec. 5. Said board of supervisors, city or town council, or the governing body of any other municipal corporation shall cause to be posted at least five copies of such order in public places within the county, school district, city, town, or other municipal corporation wherein such election is to be held, at least twelve days prior to the date of the election, and shall post a copy of said notice at each polling place within the county, school district, city, town, or other municipal corporation; provided, that in addition to the posting of such notice, publication of a copy thereof shall be made in some newspaper designated by said board of supervisors, mayor of said city or town, or the executive officer of any other municipal corporation, for at least thirty days prior to the date of such election. [168]

Such election shall be held in conformity with the provisions of the general election laws of the state and by the officers of election provided to be appointed by, and who shall qualify, under such laws; the return of said election in the case of a county, or school district, shall be made to the board of supervisors of the county wherein such election is held, and, in any other case, to the city or town council or other governing body of any other municipal corporation within twelve days from the date of such election; whereupon, the board of supervisors, city or town council, or the governing body of any other municipal corporation shall hold a special meeting on the first Monday succeeding said twelfth day for the purpose of canvassing the vote cast at said election; and they shall immediately thereafter by the

certificate in the next section of this title, provided, declare the result of said election.

Said certificate of the result of election, so made, shall be *prima facie* evidence of the complete performance of all of the conditions and requirements precedent to the holding of such election.

Sec. 6, *id.*

Sec. 6. At any election so held, if a majority of the property tax-payers, who must also in all respects be qualified electors, therein voting at said election, in such county, school district, city, town, or other municipal corporation, shall vote in favor of the creation of an indebtedness in excess of four per centum of taxable property, the value of such taxable property to be ascertained as herein prescribed, it shall be the duty of the board of supervisors, city or town council, or the governing body of any other municipal corporation (at the time prescribed in section 5 hereof) to file and record in the office of the county recorder of such county wherein such election is held, a certificate showing the object of such election, the total number of votes cast at such election, the total number of votes cast in favor of the creation of such indebtedness and the total number of votes cast against the creation of such indebtedness; and such certificate shall contain a further statement that the creation of such indebtedness is ordered; and thereupon it shall immediately become the duty [169] of such board of supervisors, board of school trustees, city or town council, or the governing body of any other municipal corpo-

ration, to take such steps as are in this title required to carry out the object of such election.

Sec. 7, *id.*

Sec. 7. No political subdivision or municipal corporation other than the subdivision or municipal corporation wherein the election shall be held as above prescribed, for the creation of any indebtedness herein provided for, shall in any manner be responsible for, or charged with, the payment of any of the principal sum or interest thereon evidenced by such indebtedness.

Sec. 8, *id.*

Sec. 8. Whenever any county, school district, city, town, or other municipal corporation, shall desire under the provisions of this title to issue bonds or other evidences of indebtedness of said county, school district, city, town, or other municipal corporation, the board of supervisors, board of school trustees, city or town council, or the governing body of any other municipal corporation, may, with the assent of a majority of the property tax-payers, therein voting at said election, in such county, school district, city, town, or other municipal corporation, given in the manner herein provided, issue and sell bonds of said county, city, school district, town, or other municipal corporation, as herein provided, in the amount of indebtedness authorized at said election to be created; provided that in the call for said election hereinbefore in the second section of this title, required to be made, there shall be set forth the aggregate amount of said bonds, the term thereof, the rate of interest

to be paid thereon, when such interest shall be paid, the date of maturity of said bonds or other evidences of indebtedness, and the purposes for which the money derived from the sale of such bonds or other evidences of indebtedness shall be expended.

No bonds or other evidences of indebtedness authorized to be issued shall bear interest at a rate exceeding six per centum per annum.

Sec. 9, *id.*

Sec. 9. Whenever an issuance of bonds or other evidence of indebtedness shall have been authorized under the provisions of this title, it shall become the duty of the county board of supervisors in behalf of the county or board of school trustees, city or [170] town council or the governing body of any other municipal corporation issuing said bonds or other evidences of indebtedness, to cause said bonds to be prepared in the amount and of the denominations so authorized, which bonds, or other evidences of indebtedness shall bear the date of their issuance, shall be numbered consecutively from one upwards, and shall be signed and attested by the following persons, to-wit: when issued by the county, by the chairman and the clerk of the board of supervisors; when issued by a school district, by the chairman and clerk of the board of school trustees, countersigned by the chairman of the board of supervisors of the county wherein such school district is situated; when issued by a city or town, by the mayor and the city clerk of such city or town; and when issued by any other municipal

corporation, by the executive officer and clerk of the governing body of such other municipal corporation, with the corporate seal of any such political sub-division or municipal corporation, if there be one, affixed thereto; and said bonds shall be payable at a date not to exceed forty years from the date of their issuance.

Sec. 10, *id.*

Sec. 10. Said bonds shall be payable to bearer, and coupons for the interest shall be attached to each of said bonds so that the same may be removed therefrom without mutilating the bonds, and each of said coupons shall bear a facsimile of the signature of the officers in the preceding section hereof mentioned as said signatures appear upon said bonds; provided that it shall not be necessary to impress upon any such coupon the seal hereinbefore mentioned.

Sec. 11, *id.*

Sec. 11. Before the sale of any of such bonds or other evidences of indebtedness, the board of supervisors, in behalf of the county or of the board of school trustees, or the city or town council, or the governing body of any other municipal corporation, as the case may be, shall at a regular meeting, or at a special meeting called for [171] that purpose, cause to be entered upon the record of said body an order directing the sale of said bonds or other evidences of indebtedness, and the date and hour of said sale, and shall cause a copy of said order to be published for at least four consecutive weeks

before said sale in such daily or weekly newspaper or newspapers as may be designated by said body, together with a notice that sealed proposals will be received by them for the purchase of said bonds, or other evidences of indebtedness, on the date and hour named in said order.

Said governing body shall, at said time, and at a meeting to be held for such purpose, open all sealed proposals received by them, and shall award the purchase of said bonds to the highest and best responsible bidder; provided, that none of said bonds or other evidences of indebtedness shall be sold for a less amount than par with accrued interest. All bids or proposals received for the purchase of said bonds, or other evidences of indebtedness, shall be accompanied by a certified check for a sum not less than five per cent of the total amount of such bid, and such governing body shall have the right to reject any and all bids, and all such certified checks accompanying bids which are not accepted, and which are rejected, shall be returned to the party tendering the same.

The certified check so deposited by the successful bidder shall be retained by said board of supervisors, or city or town council, and shall be forfeited in the event that such bidder shall not carry out the terms of the contract provided herein to be entered into; provided, however, that such forfeiture shall not be deemed or taken as stipulated or liquidated damages for a breach of said contract and shall not prevent such board of supervisors,

[172] or city or town council, from recovering damages under said contract.

Sec. 12, *id.*

Sec. 12. The amount of bonds sold, their numbers and dates shall be entered upon the record of the proceedings of the governing body of the county, school district, city, town, or other municipal corporation, disposing of the same.

Sec. 13, *id.*

Sec. 13. After said bonds or other evidences of indebtedness are issued, if such indebtedness is created by a county, or a school district situated therein, and until all of said bonds or other evidences of indebtedness of such county are redeemed, the board of supervisors of such county where such indebtedness is created under the provisions of this title, and the city or town council, or the governing body of any other municipal corporation, creating such indebtedness under the provisions of this title, if such bonds or other evidences of indebtedness are issued by such city or town, is authorized and it shall be its duty to levy and cause to be collected a tax in addition to the amount of taxes which now or may hereafter be authorized by law for state and county purposes, at the same time and in the same manner as other taxes are levied and collected by such county, city, or town upon all taxable property in such county, school district, or city, town or other municipal corporation, sufficient to pay the interest on all bonds issued when such interest shall become due, and said tax when

collected shall constitute a fund for the payment of the interest on said bonds or other evidences of indebtedness and shall be called "Interest Fund."

Sec. 14, *id.*

Sec. 14. The board of supervisors of any county wherein any indebtedness shall be created under the provisions of this title, either by the county or by any school district situated therein, and the council of any incorporated city or town, shall also and in [173] addition to the taxes for state and county purposes, or the taxes for city and town purposes, as the case may be, and the tax hereinabove provided to be levied for the payment of interest on such bonds or other evidences of indebtedness, levy a tax for the purpose of redeeming said bonds or other evidences of indebtedness when the same shall mature, as specified in the order and call for election hereinbefore in this title provided to be made, and all money derived from the levy of the tax in this section provided for, when collected, shall constitute a fund and shall be called the "Redemption Fund", and shall be used for the redemption of said bonds or other evidences of indebtedness according to the number of their issue. The tax in this section provided to be levied, shall be levied annually so as to provide a fund for the redemption of such bonds or other evidences of indebtedness when the same shall mature.

S. B. 86, 1st Leg., 3rd Sess., Sec. 1.

Whenever the owner of any coupon bond issued pursuant to the provisions of this title shall present such bond to the state auditor with the request for

the conversion of such bond into a registered bond, the state auditor shall cut off and cancel the coupons of any such coupon bond so presented and shall stamp, print or write upon such bond so presented, either upon the back or the face thereof; as may be convenient, a statement to the effect that the said bond is registered in the name of the owner and that thereafter the interest and principal of said bond are payable to the registered owner. Thereafter and from time to time, any such bond may be transferred by such registered owner in person or by attorney duly authorized, on presentation of such bond to the state auditor and the bond again registered as before, a similar statement being stamped, printed or [174] written thereon. Such statement stamped, printed or written upon any such bond may be substantially in the following form:

(Date, giving month, year and day.)

This bond is registered pursuant to the statutes in such case made and provided in the name of.....
....., and the interest and principal thereof are hereafter payable to such owner.

State Auditor.

If any bond shall have been registered as aforesaid, the principal and interest of such bond shall be payable to the registered owner. The state auditor shall enter in the register of said bonds kept by him pursuant to the provisions of this title, or in a separate book, the fact of the registration of such bond and in whose name respectively, so that

said register or book shall at all times show what bonds are registered and the name of the registered owner thereof.

Sec. 15, Act 29, Page 61, Laws 1912.

Sec. 15. When any bonds or other evidences of indebtedness created under the provisions of this title shall mature, it shall be the duty of the county treasurer, when such bonds shall have been issued by the county or any school district, and of the city and town treasurer, as the case may be, when any such bonds shall have been issued by any incorporated city or town, to give notice for four weeks in some newspaper published in the county in which such bonds or other evidences of indebtedness shall have been issued, of the intention of such county, school district, city, or town to redeem such bonds, stating the amount thereof, and such redemption shall be made by the county, city, or town, as the case may be, and all said bonds or evidences shall cease to draw interest at the expiration of four weeks after the date of said notice, and if such bonds so noticed for redemption shall not be presented [175] for redemption within three months from the date of such notice, said county treasurer, or city or town treasurer, as the case may be, shall apply said money to the redemption of the bonds next in the order of the number of their issue.

When any interest shall be due upon any of said bonds or other evidences of indebtedness, under the provisions of this title, the coupons due and payable shall be delivered to the county, city, or town treas-

urer, as the case may be, who shall pay the same and write the word "Cancelled" across the face thereof, and said coupons so paid and cancelled shall be said treasurer's receipt for the payment of the same, and when any of said bonds or other evidences of indebtedness shall be paid and redeemed, said treasurer shall in like manner mark them "Cancelled" on the face thereof over his signature, and immediately deliver the same to the clerk of the said board of supervisors, or city or town council, as the case may be, taking his receipt therefor, and said clerk upon receipt of said cancelled bonds or other evidences of indebtedness shall file the same in his office and report the same to the board of supervisors, or city or town council, as the case may be.

The board of supervisors, city or town council, as the case may be, of any county, school district, city or town, issuing bonds or other evidences of indebtedness under the provisions of this title shall, by resolution entered upon its minutes, prior to the offering for sale of said bonds or other evidences of indebtedness, and within a period of fifteen days from the canvassing of the vote of the election herein provided for, prepare a form of bond, which shall substantially conform to the description of said bonds mentioned in the order required by this title to be published and recorded.

Sec. 16, *id.*

Sec. 16. If any bonds or other evidences of indebtedness shall be issued and sold by any county,

school district, city, town, or other municipal corporation, under the [176] provisions of this title, for the purpose of erecting and furnishing any public building within such county, school district, city, town, or other municipal corporation, the board of supervisors, in the event such public building shall be erected and furnished by the county or school district, and the city or town council in the event such public building is to be erected and furnished by a city, town, or other municipal corporation, shall, within the period which it is required under the provisions of the preceding section of this title, prepare and adopt a form of bond or other evidences of indebtedness, adopt plans and specifications for such building, and said board of supervisors, city or town council, as the case may be, shall, as soon as may be practicable after the adoption of such plans and specifications, advertise for bids for the erection and furnishing of said building.

The notice of advertisement for such bids shall set a day and hour, not less than forty days from the date of such notice, when said bids shall be received and opened, and said board of supervisors, city or town council, as the case may be, shall award the contract for the erection and furnishing, or the erection or furnishing of said building to the lowest and best responsible bidder, provided that any and all bids so submitted may be rejected. In the event any bid shall be accepted, said board of supervisors, city or town council, as the case may be, shall require the person or persons to whom such award or contract has been let, to enter into a written

contract with said board of supervisors, city or town council, as the case may be, for the erection and completion of said building and the furnishing thereof, and shall require such person or persons entering into such contract to give bonds to said county, city or town, for the amount of the contract, [177] with two or more sufficient sureties, or give a surety company bond in a like manner, conditioned upon the faithful performance of the contract, such bond to be approved by the board of supervisors, city or town council, as the case may be.

Such board of supervisors, city or town council, as the case may be, may agree to pay and pay upon such contract as follows: Upon the completion of one-third of the work, one-fifth of the contract price; upon completion of two-thirds of the work, an amount sufficient with the prior payment to make one-half of the contract price; and the balance of the contract price shall be paid upon the completion and acceptance of the buildings and the furnishing thereof under said contract by said board of supervisors, city or town council.

In the event that it shall be deemed necessary in conjunction with the erection of the buildings herein mentioned to purchase a building site or sites, the call for the election shall state the proportion of the total amount of the fund to be derived from the issuance and sale of bonds or other evidences of indebtedness which shall be expended in the purchase of such building site or sites.

Sec. 17, id.

Sec. 17. Any incorporated city or town, with the assent of the qualified voters, as provided in the third section of this title, may be allowed to issue bonds or other evidences of indebtedness not exceeding fifteen per cent additional, for supplying such city or town with water, artificial lights, or sewers, when the works for supplying such water, artificial lights, or sewers, are or shall be owned or controlled by the municipality.

Sec. 18, id.

Sec. 18. The expenses of all proceedings had, [178] under this title, shall be borne by the county, school district, city, town, or other municipal corporation, instituting the proceedings necessary and required hereunder; provided, however, that in the event the bonds or other evidences of indebtedness herein authorized shall be sold, such expenses shall be deducted from the proceeds of the sale of such bonds or other evidences of indebtedness.

Sec. 1, S. B. 38, 1st Leg. 3rd Sess. 1913.

Sec. 19. Nothing in this title contained shall be construed to prevent any county, school district, city, town, or other municipal corporation from creating an indebtedness not exceeding four per centum of the value of the taxable property in such county, school district, city, town, or other municipal corporation; provided, that if such county, school district, city, town, or other municipal corporation shall desire to fund such indebtedness by the issuance of bonds therefor, said bonds shall be issued in all respects in conformity with the provisions of this

title; and, provided, further, that it will not be necessary to hold the election required to be held herein; provided, that bonds may be issued under the provisions of this title, for the construction and reconstruction of roads, bridges and highways; for the construction of public buildings, and for any other lawful or necessary purpose. The enumeration of the above mentioned purposes shall not be deemed as restrictive of the right to issue bonds for other purposes, but rather in furtherance thereof. In case any county in the State of Arizona shall have called or held an election for the issuance of bonds, as herein provided, prior to the becoming effective of the provisions of this section, said election shall be and is hereby deemed to have been called and held pursuant to the provisions of this title, and the bonds [179] that may be hereafter issued pursuant to such election, shall be in all respects as valid and legal as though the provisions of this section had been in force at the time of said election.

Sec. 20. All Acts and parts of Acts in conflict with this Act are hereby repealed.

Sec. 21. This Act shall take effect from and after the first day of October, 1913.

Apr 24 1913

Read third time in full and passed by following vote:

28 ayes, —nays, 4 absent, 3 excused.

(signed) H. H. LINNEY

Speaker of the House

Passed the Senate April 17, 1913, by a vote of 17 ayes, 2 noes, — absent — excused.

(signed) M. G. CUNNIFF

President of the Senate

Approved April 29th, 1913:

(signed) GEO. W. P. HUNT

Governor of Arizona. [180]

STATE OF ARIZONA
OFFICE OF THE SECRETARY

United States of America

State of Arizona—ss.

I, Dan E. Garvey, Secretary of State, do hereby certify that the Hereto Attached Is a True, Correct and Complete Copy of Senate Bill No. 60, Chapter 64, Third Special Session, First Legislature, State of Arizona, Entitled:

“AN ACT — TO PROVIDE FOR THE ARRANGEMENT, COMPILATION AND INDEXING OF THE LAWS OF THE STATE OF ARIZONA, AND THE PUBLICATION THEREOF, AND TO EXTEND THE TERM OF OFFICE OF THE PRESENT CODE COMMISSIONER, AND TO DEFINE HIS POWERS AND DUTIES, AND MAKING AN APPROPRIATION FOR HIS COMPENSATION AND THE COMPENSATION OF STENOGRAPHERS TO BE EMPLOYED BY HIM.”

All of Which Is Shown by the Original Act as Passed by the Legislature and on File in This Department.

In Witness Whereof I have hereunto set my hand and affixed the Great Seal of the State of Arizona. Done at Phoenix, the capital, this 13th day of May, A. D. 1943.

(Great Seal of the
State of Arizona)

DAN E. GARVEY

Secretary of State [181]

AN ACT

TO PROVIDE FOR THE ARRANGEMENT, COMPILATION AND INDEXING OF THE LAWS OF THE STATE OF ARIZONA, AND THE PUBLICATION THEREOF, AND TO EXTEND THE TERM OF OFFICE OF THE PRESENT CODE COMMISSIONER, AND TO DEFINE HIS POWERS AND DUTIES, AND MAKING AN APPROPRIATION FOR HIS COMPENSATION AND THE COMPENSATION OF STENOGRAPHERS TO BE EMPLOYED BY HIM.

Be It Enacted by the Legislature of the State of Arizona:

Sec. 1. The term of office of the present code commissioner is hereby extended until the comple-

tion of the compilation, indexing and arrangement of the laws of this state as hereinafter provided.

Sec. 2. It shall be the duty of the said code commissioner to compile, arrange under proper heading and subjects and chapters all laws of a general nature which shall be in force after the adjournment of the third special session of the first legislature of the state of Arizona, or to take effect thereafter, and not repealed or adjudged unconstitutional by the supreme court of Arizona, with authority to arrange said laws into titles and chapters, to re-number the several sections contained therein into paragraphs as such compilation and arrangement may require and to re-number titles and chapters, and to provide such head notes to titles and chapters as may be necessary to prepare such laws for publication.

3. The said code commissioner shall also prepare such marginal notes as he may deem proper, to be printed and published upon the margin of the pages of the bound volumes of the statutes.

Sec. 4. The said code commissioner shall also prepare for publication with the said statutes, in the first part of the first volume as hereinafter provided, a copy of the Declaration of Independence, the Articles of Confederation of 1777, the Constitution of the United States, the Constitution of the State of Arizona, and amendments thereto, Election Ordinance No. 2, the Act of Congress, known as the Enabling Act, or so much thereof as relates to the then territory of Arizona, and the act admitting [182] Arizona to statehood, together with final proclamation of the President, the treaties between the United

States and Mexico, known as the Treaty of Guadalupe Hidalgo, and the Gadsden Treaty, and the acts of Congress relating to the naturalization of aliens, and the authentication of laws and records, together with an index with each of the foregoing.

Sec. 5. The said code commissioner shall also prepare a full and complete index to the laws contained in each of the volumes hereinafter provided.

Sec. 6. Said code commissioner shall also prepare suitable annotations, which annotations shall show by proper and appropriate references all decisions of the Supreme Court of Arizona, commenting upon, or in any way referring to any section of the Laws or Constitution of the State of Arizona up to the first day of July, 1913, and all decisions of the Supreme Court of the United States construing or commenting upon any laws of the Territory or State of Arizona; such annotations shall state only the title of the case and the names of the parties, the number of the volumes and the name and page of the report containing such decisions.

Sec. 7. Nothing in this act shall be construed as giving said code commissioner any power to change or modify or make any law or laws, but only as giving him full power and authority to complete a full compilation and arrangement for publication of the laws of this state.

Sec. 8. The said code commissioner shall receive the sum of One Thousand Dollars for expenses upon the passage and approval of this Act; and compensation at the rate of Four Hundred and Fifty

Dollars a month until the said services are completed.

Sec. 9. The said code commissioner is authorized and empowered to employ one or more stenographers to assist in the preparation of said index and the performance of the services herein provided, who shall be paid as compensation not to exceed one hundred fifty dollars per month each.

10. Upon the presentation of verified claims, certified by the said code commissioner as being correct, the state auditor shall draw his warrants upon the state treasurer, payable out of [183] the general fund, for the compensation of the code commissioner and for said stenographer or stenographers, and the state treasurer is hereby authorized and directed to pay the same.

Sec. 11. Upon the completion of the compilation, arrangement and indexing of the said laws and other matters hereinbefore provided, the same shall be published by the secretary of state. All laws of a general nature so compiled, arranged and indexed by the said code commissioner shall be published in two volumes to be known respectively as the Revised Statutes of Arizona, 1913, Civil Code, and the Revised Statutes of Arizona, 1913, Penal Code. All laws of a civil nature shall be published in the first mentioned volume, and all laws contained in the penal code and other penal statutes shall be published in the second volume above mentioned.

Sec. 12. The said laws shall be printed and published in volumes bound in sheep or buckram,

and of the same size of page and type as the volume known as the Revised Statutes of Arizona, 1901.

Sec. 13. When the manuscript of the said laws and other matters hereinbefore mentioned, and the indexes have been prepared for publication, the secretary of state shall call for competitive bids for printing and binding same, and he shall award the printing thereof to the lowest, best, and most responsible bidders; provided, however, that the secretary of state shall have power to reject any and all bids and again call for competitive bids for such publication and binding; provided, further, that the secretary of state is hereby given discretion to call for bids for said printing separately from said binding, and he may award separate contracts for each.

Sec. 14. For the purpose of defraying the cost of printing and publishing said volumes the secretary of state is hereby authorized to draw upon the general fund in favor of any contractor as herein provided; the state auditor is hereby authorized and directed to draw his warrant, specifying thereon the purpose for which it is drawn in payment for such publication; and the state treasurer shall pay the same from any funds in the general fund not otherwise appropriated.

Sec. 15. All laws of a special and temporary nature and effect, including all appropriation acts, and all local and special laws, [184] shall not be included in the volumes to be known as the Revised Statutes of Arizona, 1913, but shall be published by the said secretary of state in a separate volume, and the secretary of state shall in like manner call

for bids and cause to be published such laws in a separate volume.

Sec. 16., Immediately after publication the secretary of state shall send, at the expense of the state, bound volumes of all such published volumes as follows: To the governor, Judges of the Supreme Court, the Attorney General, State Engineer, Secretary of State, State Auditor, State Treasurer, Superintendent of Public Instruction, Clerk of the Supreme Court, Reporter of decisions of the Supreme Court, Code Commissioner, the stenographer of the Code Commissioner, the Corporation Commission, the Tax Commission, the Land Commission, and the Fair Commission, each one copy; to the Superior Court of each county, the clerk of the superior court of each county, one copy, the county attorney of each county, two copies; the board of supervisors, the treasurer, the sheriff, the assessor, the recorder, the county school superintendent, and to each justice of the peace, for the use of his office and to be transmitted to his successor in office, each one copy; to each state senator and representative and to the secretary and the assistant secretary of the senate, and the chief clerk and the assistant chief clerk of the house of the legislature which enacted said acts, one copy each; to the Library of Congress, two copies; to the State Library, ten copies; to the State University and State Normal Schools, one copy each; to each state and territory which practices like comity with this state, one copy; and to effect exchanges with foreign governments, twenty-five copies; to the United States District Judge

and to the United States District Attorney for this district, and to his assistants, one copy each; to the Judges of the United States Circuit Court of Appeals for this Circuit, one copy each; and to each public library in the state of Arizona applying therefor, one copy. The clerk of the board of supervisors of each county shall, within one month after the adjournment of the legislature, forward to the secretary of state a statement containing the names and addresses of all officers in his county entitled by law to receive a [185] copy of the acts of the legislature.

Sec. 17. The said volumes containing the laws of a special, local, or temporary character shall be distributed as follows: One copy to each of the members of the senate and house of representatives by whom the same was passed; to the Governor, the Attorney General, the Secretary of State, the State Auditor, the Corporation Commission, the Tax Commission, the State Engineer, the State Treasurer, the Superintendent of Public Instruction, each one copy; to the judges of the supreme court and clerk of said court, each one copy; to the judges of the superior court, each one copy; to the superintendents of the asylum for the insane, state prison, industrial school, and to the chairman of the state fair commission, each one copy, and to other state or county officers applying therefor, each one copy.

Sec. 18. The secretary of state shall indelibly mark each book delivered to officers in this state (except members of the legislature) with the name

of the county to which, and the official designation of the officer to whom it is sent. Such books shall remain the property of the state and shall be, by the officers receiving them, delivered to their successors.

Sec. 19. There is hereby appropriated out of the general fund, for the purpose of paying the compensation of the said code commissioner for the services herein provided, and for the compensation of said stenographer or stenographers, as he may employ, the sum of six thousand dollars.

Sec. 20. There is hereby further appropriated out of the general fund of this state a sum of money sufficient to pay the cost of publication of said laws, as hereinbefore provided, and furnishing the necessary paper and supplies as herein provided.

Sec. 21. The number of volumes to be published shall be as follows: of the Revised Statutes of Arizona, 1913, the Civil Code, three thousand volumes; of the Revised Statutes, 1913, the Penal Code, three thousand volumes; and of the other laws of the state, five hundred volumes. The volumes, when published, shall be delivered to the secretary of state and by him shall be placed on sale. The Secretary of State shall fix the price at which such volumes shall be [186] sold. Such price shall be so fixed that the amounts to be received from the estimated number of volumes to be sold will reimburse the State for the cost of printing and binding all such volumes. All moneys received by the secretary of state for the sale of the volumes shall be paid to the state treasurer for the general fund of the state.

Sec. 22. The secretary of state shall furnish the said code commissioner with all paper and other necessary supplies for the performance of the services herein required. The cost thereof shall be certified by the secretary of state to the state auditor who shall from time to time draw his warrant on the general fund in favor of the secretary of state for the cost of such paper and supplies, and the state treasurer shall pay the same as other warrants are paid.

Sec. 23. The secretary of state shall cause the volumes labeled "Revised Statutes of Arizona, 1913, Civil Code," and the "Revised Statutes of Arizona, 1913, Penal Code", to be copyrighted for the use and benefit of the state. The copyright shall be taken out by the secretary of state in the name of the State of Arizona; provided, however, that the secretary of state may, upon written application permit any person to publish in pamphlet or book form any part of said statutes relating to not more than one subject.

Whereas, at the present session of the first legislature of the State of Arizona, the statutes have been codified and revised and it is necessary that prompt publication be made thereof in suitable forms for distribution, and for that reason the public peace and safety require that this act shall take immediate effect, it is hereby declared an emergency exists, and this act shall take effect and be in full force and effect from and after its passage and its approval by the governor, and is hereby

exempt from the operation of the referendum provisions of the State Constitution.

May 13, 1913.

Read third time in full and passed the House as amended by following vote: 27 ayes, —nays, 5 absent, 3 excused.

(signed) H. H. LINNEY

Speaker of the House

Approved May 16th, 1913

(signed) GEO. W. HUNT

[Seal]

Governor of Arizona

Passed the Senate May 12, 1913, by a vote of 17 ayes, 1 noes, -- absent, 1 excused.

(signed) M. G. CUNIFF

President of the Senate

House amendments concurred in by the Senate May 14, by the following votes: 16 ayes, -- noes, 1 absent, 2 excused.

(signed) M. G. CUNIFF

President of the Senate [187]

[Endorsed]: Filed May 17, 1943. [188]

Plaintiffs' Exhibit No. 1

In the Supreme Court of the State of Arizona
No. -----

MARICOPA COUNTY, a body politic and corporate,

Plaintiff,

vs.

SIDNEY P. OSBORN, Governor of the State of Arizona; ANA FROHMILLER, State Auditor of the State of Arizona; and J. D. BRUSH, State Treasurer of the State of Arizona, constituting
THE LOAN COMMISSIONERS OF THE
STATE OF ARIZONA,

Defendants.

PETITION FOR WRIT OF MANDAMUS

To the Honorable, the Supreme Court of the State of Arizona:

The petition of Maricopa County, a body politic and corporate, respectfully shows: [190]

I.

That plaintiff is a body politic and corporate, created and existing under the Constitution and laws of the State of Arizona.

II.

That Sidney P. Osborn, as Governor of the State of Arizona, Ana Frohmiller, as State Auditor of the State of Arizona, and J. D. Brush, as State Treasurer of the State of Arizona, are constituted, and they now are, under and by virtue of their

offices and the laws of the State of Arizona, the Loan Commissioners of the State of Arizona, whose duties are prescribed by Chapter 10, Arizona Code Annotated, 1939, and particularly by Article 4 thereof. That under and by virtue of the provisions of said Article 4 of Chapter 10, Arizona Code Annotated, 1939, it is the duty of said Loan Commissioners upon a compliance with the conditions of said Article 4, to authorize and provide for the paying, redeeming and refunding of all, or any part of, the outstanding principal and interest of the bonded indebtedness of the counties of the State of Arizona, including such indebtedness of plaintiff herein, and to issue negotiable coupon bonds of the State of Arizona for the purpose of refunding such outstanding indebtedness. That prior to the year 1919 and at all times since that date there existed in [191] the State of Arizona a commission known as the Loan Commissioners of the State of Arizona; that said Loan Commissioners constitute an official body of the State of Arizona and that defendants, and each of them, are the present incumbents, holding the office and constituting the body known as the Loan Commissioners of the State of Arizona. That at all of the times herein mentioned the law of the State of Arizona creating said Loan Commissioners of the State of Arizona, and prescribing their duties, was in full force and effect in the State of Arizona.

III.

That Plaintiff, Maricopa County, heretofore, to-wit under date of June 15, 1919, pursuant to the

laws of the State of Arizona, duly authorized and issued \$4,000,000 principal amount of Highway Bonds, bearing interest at the rate of $5\frac{1}{2}\%$ per annum, payable semi-annually, maturing over a period of 20 years beginning June 15, 1930, of which issue there were on or about July 7, 1941, outstanding and unpaid bonds in the principal amount of \$2,100,000, whereof there are now outstanding and unpaid as of the date hereof \$1,700,000 principal amount of said bonds, being bonds numbered 2301 to 4000, both inclusive, which mature and become payable in serial amounts on June 15th in each of the years 1944 to 1949, both inclusive. That [192] of said issue there is also outstanding and unpaid \$200,000 principal amount of bonds maturing June 15, 1943, for the payment of which plaintiff now has funds in its treasury and which are not, therefore, affected by the present proceedings.

That plaintiff, Maricopa County, heretofore, to-wit under date of January 15, 1921, pursuant to the laws of the State of Arizona, duly authorized and issued \$4,500,000 principal amount of Highway Bonds, bearing interest at the rate of 6% per annum, payable semi-annually, maturing over a period of 20 years beginning January 15, 1931, of which issue there were on or about July 7, 1941, outstanding and unpaid bonds in the principal amount of \$2,800,000, whereof there are now outstanding and unpaid as of the date hereof \$2,400,000 principal amount of said bonds, being bonds numbered 6101 to 8500, both inclusive, which mature and become

payable in serial amounts on January 15th in each of the years 1944 to 1951, both inclusive.

IV.

That on July 7, 1941, the Board of Supervisors of Maricopa County passed and adopted a resolution officially demanding that the defendants herein, as the Loan Commissioners of the State of Arizona, redeem and refund said issued and outstanding Highway [193] Bonds of Maricopa County in the aggregate principal amount of \$4,900,000, which aggregate principal amount was outstanding as of said July 7, 1941, and by such resolution the Board of Supervisors of Maricopa County found and recited that the redeeming and refunding of such outstanding indebtedness would be for the profit and benefit of Maricopa County.

V.

That on November 7, 1941, said Loan Commissioners informed the Board of Supervisors of Maricopa County, in writing, that they were unauthorized to refund said outstanding indebtedness of Maricopa County as demanded by Maricopa County, as aforesaid, and said Loan Commissioners did thereupon refuse to redeem and refund said outstanding Highway Bonds of Maricopa County or to provide for the refunding thereof, and thereupon, to-wit, on February 2, 1942, Maricopa County filed an original action in mandamus in this Court entitled: "Maricopa County, a Municipal Corporation, Plaintiff, vs. Sidney P. Osborn, Governor of the State of

Arizona, Ana Frohmiller, State Auditor, and Joe Hunt, State Treasurer, constituting the Loan Commissioners of the State of Arizona, defendants, No. 4489," to command said Loan Commissioners to redeem and refund said outstanding indebtedness of Maricopa [194] County notwithstanding the refusal of said Loan Commissioners so to do.

VI.

That said original action filed in this Court, as aforesaid, duly came on for hearing and decision, and on May 4, 1942, this Court rendered and entered its judgment making peremptory the alternative writ of mandamus which had theretofore issued in said action, and by said peremptory writ of mandamus said Loan Commissioners were commanded to redeem said outstanding indebtedness of Maricopa County.

VII.

That pursuant to said peremptory writ of mandamus which issued from this Court in said action, as aforesaid, said Loan Commissioners, on November 19, 1942, in a meeting regularly and duly called and convened, passed and adopted a resolution authorizing the issuance of refunding bonds of the State of Arizona for the purpose of redeeming said Maricopa County Highway Bonds then outstanding, as hereinabove alleged in paragraph III hereof, in said aggregate principal amount of \$4,100,000, and by such resolution called for bids for the purchase of said refunding bonds. Said resolution passed and adopted by the Loan Commis-

sioners of the State of Arizona on November 19, 1942, as [195] aforesaid, is in words and figures as follows, to-wit:

“RESOLUTION OF THE LOAN COMMISSIONERS OF THE STATE OF ARIZONA AUTHORIZING THE ISSUANCE AND SALE OF REFUNDING BONDS IN THE AGGREGATE PRINCIPAL AMOUNT OF \$4,100,000, IN THE DENOMINATION OF \$1,000 EACH, TO BEAR INTEREST AT A RATE NOT TO EXCEED THREE (3%) PER CENTUM PER ANNUM, SAID REFUNDING BONDS TO CONSIST OF 4,100 BONDS NUMBERED CONSECUTIVELY FROM 1 TO 4,100, BOTH INCLUSIVE, PAYABLE AT THE RATE OF \$300,000 ON THE 15TH DAY OF JULY IN EACH OF THE YEARS 1944 TO 1956, BOTH INCLUSIVE, AND AT THE RATE OF \$200,000 ON THE 15TH DAY OF JULY IN THE YEAR 1957, AND PROVIDING FOR THE GIVING OF NOTICE OF THE SALE OF SAID REFUNDING BONDS, AND PROVIDING FOR THE LEVY OF TAXES UPON ALL THE PROPERTY WITHIN MARICOPA COUNTY, STATE OF ARIZONA, SUFFICIENT TO PAY THE PRINCIPAL AND INTEREST OF SAID BONDS AT THE DATES OF THEIR MATURITY.

Whereas, Maricopa County, State of Arizona, has outstanding Highways Bonds, [196] dated June 15,

1919, in the aggregate principal amount of \$1,700,000, and also outstanding Highway Bonds, dated January 15, 1921, in the aggregate principal amount of \$2,400,000, bearing interest and maturing as follows:

MARICOPA COUNTY HIGHWAY BONDS

Dated June 15, 1919

Numbers (All Inclusive)	Maturity Dates	Amount
2301-2500	June 15, 1944	\$ 200,000
2501-2800	June 15, 1945	300,000
2801-3100	June 15, 1946	300,000
3101-3400	June 15, 1947	300,000
3401-3700	June 15, 1948	300,000
3701-4000	June 15, 1949	300,000
Total		<hr/> \$1,700,000

Interest rate: Five and one-half ($5\frac{1}{2}\%$) per centum per annum, payable semi-annually on June 15th and December 15th in each year of their issue until maturity.

MARICOPA COUNTY HIGHWAY BONDS

Dated January 15, 1921

Numbers (All Inclusive)	Maturity Dates	Amount
6101-6300	January 15, 1944	\$ 200,000
6301-6501	January 15, 1945	201,000
6502-6801	January 15, 1946	300,000
6802-7101	January 15, 1947	300,000
7102-7401	January 15, 1948	300,000
7402-7700	January 15, 1949	299,000

Numbers		
(All Inclusive)	Maturity Dates	Amount
7701-8000	January 15, 1950	300,000
8001-8500	January 15, 1951	300,000
Total		<hr/> \$2,400,000
[197]		

Interest rate: Six (6%) per centum per annum, payable semi-annually on January 15th and July 15th in each year of their issue until maturity. and

Whereas, a benefit and profit will inure to Maricopa County by the saving in interest which will be effected by Maricopa County in the event the bonds described aforesaid are refunded and sold by the Loan Commissioners of the State of Arizona for and on behalf of said county; and

Whereas, under the provision of Section 10-409 of the Arizona Code Annotated, 1939, the Board of Supervisors of Maricopa County have demanded that the Loan Commissioners of the State of Arizona provide for the refunding of such bonds by the issuance and sale of refunding bonds in the aggregate principal amount of \$4,100,000, to be used solely for the purpose of paying and redeeming the aforesaid bonds of Maricopa County;

Now, Therefore, Be It Resolved by the Loan Commissioners of the State of Arizona, as follows:

Section 1. That for the purpose of refunding Highway Bonds of Maricopa County, State of Arizona, in the aggregate principal amount of \$4,100,000, refunding bonds of the State of Arizona are

hereby authorized to be issued and sold in the aggregate principal amount of \$4,100,000.

Section 2. That said bonds shall bear the date of their issue, shall bear interest at the [198] rate of not to exceed three (3%) per cent per annum, payable semi-annually on the 15th day of January and on the 15th day of July in each year from the date thereof until maturity, shall be payable at the rate of \$300,000 on the 15th day of July in each of the years 1944 to 1956, both inclusive, and at the rate of \$200,000 on the 15th day of July, 1957, shall be numbered from 1 to 4100, both inclusive, and shall be in the denomination of One Thousand (\$1,000) Dollars each. Said bonds shall be negotiable bonds, in coupon form, and shall contain such terms, covenants, and conditions as are provided for in such bonds and in the coupons attached thereto, and shall be payable at the office of the State Treasurer of the State of Arizona, in the Capitol building, at the City of Phoenix, Maricopa County, State of Arizona.

Section 3. That said bonds shall be signed by the Loan Commissioners of the State of Arizona, shall have the seal of the State of Arizona affixed thereto, shall be countersigned by the Treasurer of the State of Arizona, and bear his official seal, shall be registered by the Auditor of the State of Arizona in a book kept for that purpose which shall show the amount said bonds and each of them are sold for. The interest coupons attached to said bonds shall bear the facsimile signature of the State Treasurer of the State of Arizona which he

shall by the signing of said bonds adopt as and for his own signature.

Section 4. That the bonds hereby authorized shall be issued upon the faith and credit [199] of the State of Arizona only in the manner and to the extent authorized and provided in Article 4 of Chapter 10 of the Arizona Code Annotated, 1939. No recitals contained in this resolution, or in the bonds hereby authorized to be issued and sold, shall be construed to impose any further or greater obligations upon the State of Arizona than as authorized by Article 4 of Chapter 10 of the Arizona Code Annotated, 1939, or any other provision of the Constitution and laws of the State of Arizona thereunto enabling.

Section 5. That the form of said bonds and coupons shall be substantially in the following form:

UNITED STATES OF AMERICA
STATE OF ARIZONA
REFUNDING BOND

No.....

\$1,000

The State of Arizona, for value received, hereby promises to pay to the bearer of this bond the principal sum of One Thousand (\$1,000) Dollars, on the 15th day of July, 19....., together with interest at the rate of (.....%) per centum per annum, payable semi-annually on the 15th day of January and on the 15th day of July of each year from the date of and until the maturity of this bond upon the presentation and surrender of the

attached coupons as they severally become due. Both principal and the interest on this bond are payable at the office of the Treasurer of the State of Arizona in the capitol building, at the City of Phoenix, Maricopa County, Arizona, in lawful money of the United States of America. [200]

This bond is one of a series of Four Thousand One Hundred (4,100) refunding bonds authorized and issued by the State of Arizona pursuant to a demand made by the Board of Supervisors of Maricopa County, State of Arizona, upon the Loan Commissioners of the State of Arizona under the provisions of Article 4 of Chapter 10 of the Arizona Code Annotated, 1939, and all other laws of the State of Arizona thereto enabling, for the refunding of a like amount of valid outstanding bonded indebtedness of said Maricopa County, and is payable only from the moneys required to be paid to the State Treasurer of the State of Arizona by said Maricopa County under the provisions of Article 4 of Chapter 10 of the Arizona Code Annotated, 1939.

It is hereby certified that the bonds of which this is one are issued in full conformity with the Constitution and laws of the State of Arizona, and particularly Article 4 of Chapter 10 of the Arizona Code Annotated, 1939, and that all conditions, acts and things required by the Constitution and laws of the State of Arizona to exist, occur, and to be performed precedent to and in the issuance of this bond exist, have occurred and have been performed, and that under the provisions of Article 4 of Chap-

ter 10 of the Arizona Code Annotated, 1939, the State Board of Equalization of the State of Arizona, or on its failure, the State Auditor of the State of Arizona, shall determine the rate of tax to be levied annually on all the taxable property within said county to pay the principal and interest of this bond as they respectively become due and payable and shall certify the [201] same to the board of Supervisors of said county and said Board of Supervisors shall enter such rate upon the assessment rolls of said county as other taxes and that if said county becomes delinquent in the payment of such taxes, said Board of Supervisors shall, before the next levy of taxes, prorate such delinquencies and make such additional levy, in addition to the current annual rate as may be certified to said Board of Supervisors by said State Board of Equalization, or said State Auditor, as may be necessary to pay the principal and interest of this bond and other bonds of this issue at their maturities and that said State Board of Equalization may reconvene said Board of Supervisors for the purpose of entering such rate or additional rate or levy or additional levy as said State Board of Equalization, or said State Auditor, may certify, as aforesaid, and that said county, or the treasurer thereof, is required by law to pay to the State Treasurer of the State of Arizona, on or before the first day of June of each year, the total amount so certified, as aforesaid, whether or not the whole amount has been collected from the levy of taxes therefor.

For the punctual payment of this bond and the interest hereon, the faith and credit of the State of Arizona are hereby irrevocably pledged only to the extent that it will cause to be levied and collected taxes, as aforesaid, for the payment of the principal and interest of this bond and will pay such principal and interest out of the moneys derived from the collection of such taxes and paid to the State Treasurer of the State of Arizona. [202]

In Witness Whereof, the State of Arizona, acting by and through the Loan Commissioners of the State of Arizona, has caused this bond to be signed by the Loan Commissioners of the State of Arizona, countersigned by the State Treasurer of the State of Arizona, and have affixed hereto the Great Seal of the State of Arizona, and the seal of the State Treasurer of the State of Arizona, and has caused the coupons attached to this bond to bear the facsimile signature of the State Treasurer of the State of Arizona, all as of this.....day of, 194.....

Governor.

State Auditor.

State Treasurer.

Loan Commissioners of the
State of Arizona.

Countersigned:

State Treasurer. [203]

COUPON

No.....

\$.....

On the day of, 19....., the State of Arizona will pay to the bearer, from moneys provided to be paid to the Treasurer of the State of Arizona for that purpose, the sum of (\$.....) Dollars, in lawful money of the United States of America, at the office of the Treasurer of the State of Arizona, at the City of Phoenix, Arizona, being the interest then due on its Refunding Bond dated....., 19....., and bearing No.

(FACSIMILE)

State Treasurer.

(Certificate to be endorsed on the
reverse side of each bond)

State of

Arizona—ss.

I, the undersigned, State Auditor of the State of Arizona, do hereby certify that the within bond has been registered by me in the book kept for that purpose in the manner provided by law.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of my office this day of, 19.....

State Auditor. [204]

Section 6. That the State Treasurer of the State of Arizona shall cause to be published in Chandler

Arizonian, a newspaper published and circulated in the County of Maricopa, State of Arizona, and in Nogales International, a newspaper published and circulated in the County of Santa Cruz, State of Arizona, and in Casa Grande Dispatch, a newspaper published and circulated in the County of Pinal, State of Arizona, a copy of the "Call for Bids" hereinafter set forth, for the purpose of inviting and receiving bids for the purchase of said refunding bonds. The call for bids shall be published in said newspapers once a week for one month before the date of the sale of said bonds and it shall be substantially as follows:

CALL FOR BIDS

Notice Is Hereby Given that sealed proposals for the purchase of refunding bonds to be issued by the Loan Commissioners of the State of Arizona on behalf of Maricopa County, State of Arizona, under the provisions of Article 4 of Chapter 10 of the Arizona Code Annotated, 1939, will be received by the Loan Commissioners of the State of Arizona at the office of the State Treasurer of the State of Arizona, in the capitol building, at the City of Phoenix, Arizona, at not later than the hour of 5 o'clock, P. M., Monday, the 1st day of February, 1943.

The aggregate principal amount of said refunding bonds is \$4,100,000, of the denomination of \$1,000 each, bearing the date of their issuance, bearing interest at the rate of not [205] to exceed three (3%) per centum per annum, interest pay-

able semi-annually on the 15th day of January and on the 15th day of July of each year from the date of the bonds until their maturity, are numbered from 1 to 4,100, both inclusive, and shall be payable at the rate of \$300,000 on the 15th day of July of each of the years 1944 to 1956, both inclusive, and at the rate of \$200,000 on the 15th day of July in the year 1957.

At the time and place above indicated, or at a later time, the Loan Commissioners of the State of Arizona will convene at their usual place of meeting within said capitol building for the purpose of considering all bids received for the purchase of said bonds and to take such action thereon as may be deemed advisable.

All bids must state the rate of interest to be paid. No bid for the purchase of said bonds at a price of less than the par value thereof will be considered and all bids must be accompanied by a certified or cashier's check drawn on a member bank of the Federal Reserve System in an amount equal to five (5%) per cent of the total par value of said bonds, said check to be drawn payable to the order of the State Treasurer of the State of Arizona. The certified or cashier's check of the successful bidder shall be retained by the Loan Commissioners of the State of Arizona to be applied upon the purchase price of said bonds and shall be forfeited in the event such bidder does not take up and pay for said bonds immediately upon their issuance and delivery to such bidder. [206] The Loan Commissioners of the State of Arizona

reserve the right to reject any and all bids received. Delivery of the bonds shall be made at the office of the State Treasurer of the State of Arizona, in the Capitol Building at the City of Phoenix, Arizona.

State Treasurer of the State
of Arizona.

Section 7. The State Board of Equalization of the State of Arizona, or on its failure, the State Auditor of the State of Arizona, shall determine the rate of tax to be levied annually on all the taxable property within said Maricopa County to pay the principal and interest of such refunding bonds as they respectively become due and payable, and shall certify the same to the Board of Supervisors of said county, and said Board of Supervisors shall enter such rate upon the assessment rolls of said county as other taxes, and if said county becomes delinquent in the payment of such taxes, said Board of Supervisors shall, before the next levy of taxes, prorate such delinquencies and make such additional levy, in addition to the current annual rate as may be certified to said Board of Supervisors by said State Board of Equalization, or said State Auditor, as may be necessary to pay the principal and interest of said bonds at their maturities, and said State Board of Equalization, in the event said Board of Supervisors fails to make such levy of taxes, shall reconvene said Board of Supervisors for the purpose of compelling said [207] Board of Supervisors to enter such rate or additional rate or

levy or additional levy as said State Board of Equalization, or said State Auditor may certify, as aforesaid, and said county, or the Treasurer thereof, shall, on or before the first day of June of each year, pay to the State Treasurer of the State of Arizona the total amount so certified to said Board of Supervisors as may be required to pay the principal and interest on such bonds, as aforesaid, whether or not the whole amount has been collected from the levy of taxes therefor.

Section 8. That the proceeds from the sale of said refunding bonds shall be used solely for the purpose of paying and redeeming the issues of the Highway Bonds of Maricopa County, State of Arizona, described as aforesaid.

Passed and Adopted by the Loan Commissioners of the State of Arizona on this 19th day of November, 1942.

SIDNEY P. OSBORN,
Governor.

ANA FROHMILLER,
State Auditor.

JOE HUNT,
State Treasurer.

Loan Commissioners
of the State of Arizona." [208]

VIII.

That pursuant to said resolution adopted by said Loan Commissioners on November 19, 1942, as aforesaid, the call for bids as authorized and in

the form set forth in said resolution was published once a month for one (1) month in three weekly newspapers published and circulated in three separate counties of the State of Arizona (one of which was published in Maricopa County and no two of which were published in the same county) such publication being for not less than five consecutive times in each of said newspapers, inviting bids for the purchase of said refunding bonds of the State of Arizona to be filed with said Loan Commissioners not later than 5:00 p. m. on Monday, the 1st day of February, 1943. That in addition, said notice of sale of said bonds was also published in "The Bond Buyer," a publication in the City and State of New York and of circulation throughout the United States of America among bond houses, investment bankers and dealers in state and municipal securities.

IX.

That pursuant to said call for bids, Bank of America National Trust and Savings Association, Boettcher and Company, and R. H. Moulton & Company submitted their joint bid in writing for the purchase of said re- [209] funding bonds and accompanied said bid with a cashier's check in the sum of \$205,000, drawn on the First National Bank of Arizona, a member of the Federal Reserve System, payable to the Treasurer of the State of Arizona; that said bid was the only bid submitted and filed with the Loan Commissioners for the purchase of said state refunding bonds. That a true copy

of said bid is set forth in the Resolution of the Loan Commissioners adopted February 10, 1943, which is set forth at length in paragraph X. hereof and is hereby referred to and incorporated herein for further particulars thereof.

X.

That on said date fixed for the receipt of said bids, said Loan Commissioners regularly and duly convened for the purpose of considering all bids and did consider said bid of Bank of America National Trust and Savings Association, Boettcher and Company and R. H. Moulton and Company for the purchase of said refunding bonds and took the same under advisement. That thereafter, to-wit, on February 10, 1943, the Board of Supervisors of Maricopa County, being advised of said bid for the purchase of said State of Arizona Refunding Bonds, duly passed and adopted a resolution requesting said Loan Commissioners to accept said bid and filed with said Loan Commissioners a copy of said [210] resolution, duly certified. Said resolution of the Board of Supervisors of Maricopa County requesting that said State of Arizona Refunding Bonds be sold and awarded in accordance with said bid is in words and figures as follows, to-wit:

“RESOLUTION OF THE BOARD OF SUPERVISORS OF MARICOPA COUNTY, ARIZONA, REQUESTING THE LOAN COMMISSIONERS OF THE STATE OF ARIZONA TO SELL \$4,100,000 STATE OF ARI-

ZONA REFUNDING BONDS TO BE ISSUED FOR THE PURPOSE OF REDEEMING A LIKE PRINCIPAL AMOUNT OF BONDS OF MARICOPA COUNTY

Be It Resolved by the Board of Supervisors of Maricopa County, Arizona, as follows:

1. The Loan Commissioners of the State of Arizona are hereby requested by the Board of Supervisors of Maricopa County to accept the bid of Bank of America, N.T.&S.A., Boettcher and Company and R. H. Moulton and Company for \$4,100,000 principal amount of State of Arizona Refunding Bonds to be issued for the purpose of redeeming a like principal amount of bonds of Maricopa County, and to make said award of said bonds to said bidders so that said bonds may be delivered March 15, 1943, or at any time subsequent thereto if it proves to be impracticable to effect such delivery by March 15, 1943. The [211] Board of Supervisors of Maricopa County hereby declares that said bidders is satisfactory to the Board of Supervisors of Maricopa County and that the sale of said refunding bonds will inure to the profit and benefit of Maricopa County.

2. That this request and recommendation is made to the Loan Commissioners of the State of Arizona for the reason that said bidders requested that said refunding bonds be delivered to them not later than March 15, 1943, upon the understanding that said bonds could be printed, executed and delivered within that time. That since the submission of said

bid it appears that due to causes beyond the control of either party, including the possibility of litigation, delivery of said refunding bonds may be delayed beyond said March 15, 1943, and said Loan Commissioners are accordingly requested to agree with said bidders that said refunding bonds shall be delivered as soon as practicable, and it is the desire of the Board of Supervisors that said bonds be sold in accordance with said bid and upon such reasonable conditions as may be required by the Loan Commissioners of the State of Arizona with respect to the maximum time of delivery of said bonds and the conditions upon which the bidders may be relieved of their obligations if, notwithstanding such sale, said bonds are not available for delivery in accordance with the terms of said bid until after March 15, 1943.

3. The Clerk of said Board of Supervisors is hereby authorized to certify this resolution [212] and to deliver to the Loan Commissioners of the State of Arizona a certified copy thereof.

Passed and Adopted by the Board of Supervisors of Maricopa County, Arizona, this 10th day of February, 1943.

BOARD OF SUPERVISORS
OF MARICOPA COUNTY,
ARIZONA

By JOHN A. FOOTE,
Chairman.

Attest:

J. E. De SOUZA, Clerk.

That thereafter, to wit, on February 10, 1943, said Loan Commissioners, at a meeting duly and regularly convened for that purpose on said date, accepted said bid and awarded the purchase of said refunding bonds to said bidders by resolution passed and adopted on said date by said Loan Commissioners and in and by said resolution duly provided for the call and redemption of said outstanding bonds of Maricopa County and directed the state treasurer of the State of Arizona to publish notice of redemption in the form and for the periods prescribed in said resolution and in the manner therein set forth, and in and by said notice of redemption directed the holder of said outstanding bonds of Maricopa County to surrender the same for payment and cancellation, and further provided that inter- [213] est on such outstanding bonds should cease from and after 30 days from the first publication of said notice of redemption; that said resolution in all respects directs the delivery of said refunding bonds to the successful bidder therefor, upon payment of the purchase price, and provides for the application of said purchase moneys when received by the state treasurer to the redemption of said outstanding bonds. Said resolution so adopted on said date by said Loan Commissioners is in words and figures as follows, to wit:

“RESOLUTION OF THE LOAN COMMISSIONERS OF THE STATE OF ARIZONA SELLING \$4,100,000 PRINCIPAL AMOUNT OF REFUNDING BONDS TO BE ISSUED

FOR THE PURPOSE OF REDEEMING A LIKE PRINCIPAL AMOUNT OF BONDS OF MARICOPA COUNTY, ARIZONA; PROVIDING FOR THE REDEMPTION OF OUTSTANDING BONDS OF MARICOPA COUNTY, AGGREGATING THE PRINCIPAL AMOUNT OF \$4,100,000; SETTING ASIDE THE PROCEEDS OF THE SALE OF STATE OF ARIZONA REFUNDING BONDS FOR THE PURPOSE OF REDEEMING SAID BONDS OF MARICOPA COUNTY AND DIRECTING NOTICE OF SUCH REDEMPTION TO BE GIVEN [214]

Whereas, the Loan Commissioners of the State of Arizona, heretofore, to-wit, on November 19, 1942, authorized the issuance of \$4,100,000 principal amount of State of Arizona Refunding Bonds and directed notice of sale thereof to be given; and

Whereas, such notice of the sale of said Refunding Bonds has been duly given and published and at the time and place fixed for the receipt of bids, the Loan Commissioners duly met to consider all bids received for the purchase of said bonds and to take such action thereon as might be deemed advisable; and

Whereas, Bank of American National Trust & Savings Association, Boettcher and Company, and R. H. Moulton and Company, duly filed their bid for the purchase of said bonds at the price of par and a premium accompanied by a cashier's check on the First National Bank of Arizona, which is

a member bank of the Federal Reserve System, payable to the Treasurer of the State of Arizona in the sum of \$205,000; and

Whereas, said bid for the purchase of said bonds and the bidders' good faith check accompanying the same are satisfactory and in accordance with law and the Board of Supervisors of Maricopa County has, by resolution determined that said bid is satisfactory and should be accepted; and

Whereas, it appears that said bid should be accepted and said bonds awarded as in this resolution provided; [215]

Now, Therefore, Be It Resolved by the Loan Commissioners of the State of Arizona, as follows:

Section 1. Refunding Bonds of the State of Arizona in the aggregate principal amount of \$4,100,000 are hereby awarded and sold to Bank of America National Trust & Savings Association, Boettcher and Company, and R. H. Moulton and Company in accordance with and subject to the terms and conditions of their said bid as follows, to-wit:

‘February 1, 1943.

‘Loan Commissioners of the

State of Arizona

Phoenix, Arizona

Gentlemen:

For all, but not less than all, of \$4,100,000.00 par value legally issued State of Arizona Refunding Bonds to be dated as of the date of their issuance, to bear interest at the rate of $2\frac{3}{4}$ per cent per an-

num, payable semi-annually January 15 and July 15, of the denomination of \$1,000.00 each, numbered from 1 to 4100, both inclusive, and maturing \$300,000.00 principal amount on July 15 in each of the years 1944 to 1956, both inclusive, and \$200,000.00 on July 15, 1957, all in accordance with your published notice of sale, we bid you the sum of par and accrued interest to date of delivery together with a premium of \$800.00. We further agree as part of the purchase price that we will waive interest on the Refunding [216] Bonds from the date of their issue to April 15, 1943, this concession on our part being made for the purpose of enabling you to complete the proceedings for the call and redemption of the outstanding bonds of Maricopa County to the end that double interest will not accrue on both the Refunding Bonds and the outstanding Maricopa County bonds. This bid is subject to the following conditions, each of which is hereby made a condition precedent to any liability on our part.

(1) That this bid shall be accepted promptly, and notice thereof given to us, in no event later than 5:00 o'clock P. M., Pacific War Time, February 10, 1943.

(2) That said Refunding Bonds shall be duly executed and delivered to us on payment of the purchase price therefor not later than 12:00 o'clock Noon, Pacific War Time, March 15, 1942.

(3) That in the event that prior to the delivery of said Refunding Bonds to us the income received by private holders from bonds of the same type and

character shall be taxable or subjected to tax or be declared to be taxable by the terms of any Federal Income Tax law either by ruling of the Bureau of Internal Revenue or by decision of any Federal Court or by amendment of the Federal Income Tax laws or otherwise, we may at our election be relieved of our obligations under this agreement to purchase said bonds. [217]

(4) The Loan Commissioners of the State of Arizona and the Board of Supervisors of Maricopa County, State of Arizona, will adopt such proceedings and take such action as may legally be required for the purpose of calling and redeeming the outstanding \$4,100,000.00 principal amount of bonds of the County of Maricopa proposed to be refunded from the proceeds of the issuance and sale of said Refunding Bonds of the State of Arizona and that such outstanding bonds of the County of Maricopa to the amount aforesaid will be called and redeemed from the proceeds of the sale of said Refunding Bonds (which shall be used for no other) purpose) and that interest on said bonds of the County of Maricopa will cease from and after the date fixed for such redemption.

(5) That you will furnish us with a full, true and correct transcript of the proceedings for the issuance of said Refunding Bonds duly certified on the basis of which we will be able to secure at our own expense, at or before the delivery of said Refunding Bonds to us, the unqualified legal opinion of Messrs. Orrick, Dahlquist, Neff & Herrington of San Francisco approving the legality of the pro-

ceedings for the issuance of said Refunding Bonds and the proceedings taken or to be taken for the call and redemption of a like principal amount of outstanding bonds of Maricopa County, State of Arizona, in all respects. If our said at- [218] torneys are unable to render their opinion approving the legality of said Refunding Bonds and said proceedings for the redemption of said outstanding bonds of Maricopa County in all respects, this bid is to be deemed cancelled and we are to be relieved from all liability hereunder, with like force and effect as though this bid had not been made.

We hand you herewith cashiers check of the First National Bank of Arizona, which is a member bank of the Federal Reserve System, in the sum of \$205,000.00 payable to the order of the State Treasurer of the State of Arizona, to be held in accordance with your advertised notice of the sale of said bonds, but to be returned to us uncashed in the event you are unable to comply with each and all of the conditions precedent above specified.

Very truly yours,

BANK OF AMERICA NA-
TIONAL TRUST & SAVINGS
ASSOCIATION.

BOETTCHER AND COM-
PANY

R. E. MOULTON AND COM-
PANY

By FRANCES MOULTON.'

Section 2. This award and the sale of said Refunding Bonds is made subject to the following conditions to which said successful bidders have consented and agreed, to-wit:

The Loan Commissioners shall have the right to deliver said Refunding Bonds to said [219] bidders subsequent to March 15, 1943, if it proves to be impracticable to print, lithograph or execute said bonds prior to said date, or to make delivery thereof prior to said date by reason of litigation or any other cause whatsoever, and any delivery of said bonds made subsequent to said date shall constitute good delivery thereof in accordance with said notice of sale, provided all other terms and conditions of said bid shall have been duly complied with.

Said purchasers shall have the right upon five days written notice to the Loan Commissioners to terminate said extended period of delivery and require that delivery of said bonds be made to them not later than five days from the date of said notice. If such delivery of said bonds is not so made to said purchasers by the State Treasurer or the Loan Commissioners within the said period of five days from the date of said notice, this sale shall be deemed cancelled and both the Loan Commissioners and said purchasers shall be relieved of all obligations one to the other. The Loan Commissioners shall be under no liability for damages for failure to deliver said bonds to said purchasers in the event of cancellation of this sale nor shall said purchasers be under any liability to the

Loan Commisioners or the State of Arizona. In the event of such cancellation of this sale the good faith check of \$205,000 deposited by said bidders shall be promptly returned to said bidders.

Section 3. Forthwith upon the payment into the state treasury of the proceeds of the sale of said \$4,100,000 principal amount of [220] State of Arizona Refunding Bonds, the state treasurer shall apportion them to a special fund which is hereby designated the "Maricopa Highway Bond Redemption Fund." Out of the moneys in said Maricopa County Highway Bond Redemption Fund the state treasurer shall pay a like principal amount of \$4,100,000 of bonds of Maricopa County designated and referred to in the resolution of the Loan Commissioners adopted November 19, 1942, which is hereby referred to and by reference incorporated herein and made a part hereof.

Section 4. The Board of Supervisors of Maricopa County and the county treasurer thereof shall cause to be deposited with the state treasurer in a special fund which is hereby designated the "Maricopa County Highway Bond Interest Fund," the amounts necessary to pay interest on the bonds of Maricopa County called for redemption, from the last interest payment date to the date of redemption. The moneys in said Maricopa County Highway Bond Interest Fund shall be used and applied by the state treasurer for the payment of interest from the last ensuing interest payment date to the date of redemption of said Maricopa County bonds.

Section 5. Forthwith upon the deposit of said proceeds of sale of said State of Arizona Refunding Bonds in said Maricopa County Highway Bond Redemption Fund and said interest moneys in said Maricopa County Highway Bond Interest Fund, it is hereby found and determined that there will be in the state treasury of the State of Arizona a sum suf- [221] ficient for the redeeming of said outstanding bonds of Maricopa County, State of Arizona, for the redemption of which said State of Arizona refunding bonds are authorized to be issued.

Section 6. Upon the deposit of the funds as provided in Section 5 hereof, the state treasurer of the State of Arizona is hereby authorized and directed to call for redemption and to redeem all of the outstanding bonds of Maricopa County more particularly described in the Notice of Redemption hereinafter set forth. The state treasurer shall cause notice of such call for redemption to be published at least two (2) consecutive times in the "Arizona Weekly Gazette," a newspaper published in the City of Phoenix, the state capitol of the State of Arizona, and in addition thereto said state treasurer shall cause said notice to be published once a week for one (1) month in three (3) newspapers published in the State of Arizona (no two of which shall be published in the same county), and such notice shall be published in the "Chandler Arizonan," a newspaper published and circulated in the County of Maricopa, State of Arizona, and

in the "Nogales International," a newspaper published and circulated in the County of Santa Cruz, State of Arizona, and in the "Casa Grande Dispatch," a newspaper published and circulated in the County of Pinal, State of Arizona. In addition to such publications in the State of Arizona, which are hereby declared to be sufficient and to constitute adequate public notice of such call for redemption, the state treasurer is hereby au- [222] thorized to cause such Notice of Redemption to be published once in "The Bond Buyer," a publication in the City and State of New York and of general circulation throughout the United States of America among dealers in municipal bonds and institutions and individual investors holding municipal bonds, and, also, to cause such Notice of Redemption to be published once in the "Wall Street Journal, Pacific Coast Edition," a newspaper published in the City and County of San Francisco, State of California, and of general circulation throughout the Pacific Coast of the United States among municipal bond dealers, investors and institutional holders of municipal bonds; but no error or informality in such publication in said newspapers published in New York and San Francisco, respectively, or failure of publication in either or both thereof shall affect the validity of such call for redemption, provided that notice thereof be published in said newspapers in the State of Arizona for the periods above specified. Said state treasurer is further authorized to cause a copy of such advertised Notice of Redemp-

tion to be mailed to Bankers Trust Company of the City of New York, State of New York, and to each bank or trust company or paying agent at which the interest on said bonds of Maricopa County hereby called for redemption was made payable.

Section 7. Said notice of call for redemption shall be substantially in the following form: [223]

NOTICE OF REDEMPTION MARICOPA
COUNTY STATE OF ARIZONA HIGH-
WAY BONDS

Notice Is Hereby Given, that pursuant to law and the proceedings of the Board of Supervisors of Maricopa County and the Loan Commissioners of the State of Arizona, all of the following described bonds of Maricopa County, State of Arizona are hereby called for redemption and will be paid on.....1943, to-wit:

Name of Bond	Date of Issue	Bond Numbers (all inclusive)
Maricopa County		
Highway Bonds	June 15, 1919	2301 to 4000
Maricopa County		
Highway Bonds	Jan. 15, 1921	6101 to 8500

Said bonds will be redeemed at the face amount thereof and accrued interest thereon to and including....., 1943. Said bonds hereby called for redemption must be surrendered on said redemption date (with all interest coupons maturing subsequent to said redemption date) at the office of

the state treasurer of the State of Arizona, Capitol Building, Phoenix, Arizona, for payment and cancellation. If any of said bonds hereinabove numbered and described are not presented for payment and cancellation thirty (30) days after the first publication of this notice, to-wit, on or before....., 1943, interest on all such bonds will cease from and after said date. [224]

This notice is given pursuant to proceedings of the Loan Commissioners of the State of Arizona and the concurrent action of the Board of Supervisors of Maricopa County, State of Arizona, adopting and ratifying the same.

Dated, Phoenix, Arizona,, 1943.

.....

State Treasurer of the State
of Arizona

.....

County Treasurer of Mari-
copa County, State of Ari-
zona.

Section 8. If the state treasurer has knowledge of the names and addresses of the holders of any of said bonds hereby called for redemption, said state treasurer is further authorized and directed to deposit in the United States Post Office at Phoenix, Arizona, a copy of the foregoing notice of call for redemption, enclosed in a sealed envelope with postage thereon prepaid, addressed respectively to such owner or owners whose names and

addresses are known to said state treasurer, each of which notices shall be mailed, as above provided, by depositing the same in the United States Post Office at least thirty (30) days prior to said last mentioned redemption date.

Section 9. Whenever such outstanding bonds of Maricopa County hereby called for redemption are presented for payment, the state auditor shall endorse on each bond the [225] amount due thereon and shall write across the face of each bond the date of its surrender and the name of the person surrendering the same and shall keep proper record thereof, and when the state treasurer pays any of said bonds of Maricopa County so called for redemption, he shall cancel such bonds by perforating the same and indorsing thereon by writing or stamping in ink the words "Redeemed and Cancelled," with the date of cancellation, and shall thereupon cause said bonds so cancelled to be delivered to the county treasurer of Maricopa County, who shall give his receipt therefor, and such receipt shall be full acquittance to the state treasurer and the state auditor of the State of Arizona for the application of the moneys in the Redemption Fund hereinabove specified, used and applied for the purpose of redeeming said bonds of Maricopa County.

Section 10. This resolution shall take effect immediately.

Passed and Adopted by the Loan Commission-

ers of the State of Arizona, on this 10th day of February, 1943.

SIDNEY P. OSBORN,
Governor.

ANA FROHMILLER,
State Auditor.

JOE HUNT,
State Treasurer.

Loan Commissioners of the State
Arizona.” [226]

XI.

That thereafter, to-wit, on February 12, 1943, the Board of Supervisors of Maricopa County, being advised of said award and the sale of said refunding bonds, duly passed and adopted its resolution approving said sale of said State of Arizona Refunding Bonds and authorized and directed the county treasurer of Maricopa County to join in said notice of redemption of said outstanding bonds of Maricopa County, to the end that interest on said outstanding bonds should cease 30 days from and after the date of publication of said notice of redemption, which resolution of said Board of Supervisors is in words and figures as follows, to-wit:

“RESOLUTION OF THE BOARD OF SUPERVISORS, MARICOPA COUNTY, STATE OF ARIZONA.

Whereas, the Board of Supervisors of Maricopa County heretofore demanded that the Loan Com-

missioners of the State of Arizona redeem \$4,100,000 principal amount of outstanding bonds of Maricopa County in the manner provided by law; and

Whereas, pursuant to said demand the Loan Commissioners have duly authorized and sold \$4,100,000 principal amount of State of Arizona Refunding Bonds and have allocated the proceeds thereof, when the same shall have been paid into the state treasury, to the exclusive purpose of paying and redeeming said [227] outstanding bonds and have directed that notice of such redemption shall be given in the manner provided by law;

Now, Therefore, Be It Resolved by the Board of Supervisors of Maricopa County, State of Arizona, as follows:

Section 1. The proceedings heretofore taken by the Loan Commissioners of the State of Arizona for the purpose of calling and redeeming \$4,100,000 principal amount of Maricopa County bonds described in said proceedings are hereby ratified, confirmed and approved.

Section 2. The Board of Supervisors of Maricopa County, by concurrent action with said Loan Commissioners, hereby authorize and direct the publication and giving of notice of call for redemption in all respects as provided in the resolution of the Loan Commissioners adopted February 10, 1943, which is hereby referred to and by reference incorporated herein and made a part hereof, and the county treasurer of Maricopa County is hereby authorized and directed to do

all acts and take all steps necessary to effect the call and redemption of said outstanding bonds, and the joint signature of said Notice of Redemption by the state treasurer and the county treasurer of Maricopa County is hereby ratified and approved and declared to constitute the concurrent action of this Board of Supervisors of Maricopa County and the Loan Commissioners of the State of Arizona. [228]

Section 3. The county treasurer of Maricopa County is hereby authorized and directed to pay to the state treasurer of the State of Arizona, a sum sufficient to cover the interest accruing on said bonds of Maricopa County so called for redemption from the last interest payment dates, respectively, until thirty (30) days after the date of such notice of redemption, at which time all interest on said outstanding bonds of Maricopa County so called for redemption shall cease.

Passed and Adopted by the Board of Supervisors of Maricopa County, Arizona, this 12th day of February, 1943.

BOARD OF SUPERVISORS
OF MARICOPA COUNTY,
ARIZONA.

By JOHN A. FOOTE,
Chairman.

Attest:

J. E. DE SOUZA,
Clerk."

XII.

That notwithstanding said award and the sale of said State of Arizona refunding bonds and the obvious duty of said Loan Commissioners to execute and deliver said bonds and to apply the proceeds of sale to the redemption of said then outstanding Highway Bonds of Maricopa County, said defendants, on February 12, 1943, advised the Board of Supervisors of Maricopa County, in writing, as such Loan Commissioners, that they would not [229] execute or deliver any of said refunding bonds, and said Loan Commissioners have refused, and do now refuse, to execute or deliver any of said State of Arizona Refunding Bonds; that said purchasers have offered and agreed to pay the purchase price of said State of Arizona Refunding Bonds as set forth in their bid therefor, and the treasurer of the State of Arizona holds, as security for the payment of said purchase price, said cashier's check in the sum of \$205,000, and that said purchasers are ready, able and willing to pay said purchase price into the state treasury of the State of Arizona. That the proceeds of the sale of said State of Arizona Refunding Bonds, when received by the state treasurer, can be and will be applied by said state treasurer to the call and redemption of the outstanding bonds of Maricopa County and interest on said bonds so called for redemption will cease 30 days from and after the date of publication of said notice of redemption, and that the saving in interest to Maricopa County and the taxpayers thereof upon such re-

demption of its outstanding bonds will be in excess of \$10,000 per month or \$120,000 per year. That said defendants, as and constituting the Loan Commissioners of the State of Arizona, base their refusal to execute and deliver said bonds upon the opinion of the Attorney General of the State of Arizona. That said defendants, as and constituting such Loan Commissioners, [230] have advised plaintiff in support of their failure and refusal to execute and deliver said refunding bonds, that the same cannot legally be issued for the following reasons, and each of them:

“1. None of the outstanding Highway Bonds of Maricopa County (for the redemption of which the Refunding Bonds of the State of Arizona are proposed to be issued) are subject to redemption at the option of Maricopa County, or upon call by the Loan Commissioner, prior to their fixed maturity dates. Neither the Loan Commissioner nor the County can compel bondholders to surrender their bonds prior to the fixed maturity dates set forth in the bonds and accordingly if State of Arizona Refunding Bonds were issued at this time (long prior to the fixed maturity dates of your County Highway Bonds) the taxpayers of Maricopa County would be compelled to pay interest both on the County Highway Bonds and also upon the State Refunding Bonds to their detriment. In short, since the holders of the County Highway bonds cannot be compelled to surrender them, they would be entitled to sue and collect the interest accruing thereon until the due dates of the bonds

themselves. If you cannot stop interest from running on the outstanding county bonds no benefit or profit will result to the county from the issuance of State Refunding Bonds. This is clear.

[231]

2. Even if it were assumed that your outstanding County bonds were subject to call for redemption and that the fixed maturity dates of the bonds might be accelerated so that the County bonds could all be made to mature forthwith, there is no legal procedure by which call for redemption may be made under the existing law. Obviously individual and personal notice to each and every bondholder would be required and this you cannot give as it is impossible to ascertain the names of the owners of negotiable bonds which are being transferred every day in the open market. Hence any published notice of redemption would be an idle act and interest would continue to run on the outstanding County bonds and the County would be required to pay the same.

3. The credit of the State of Arizona is at stake and we cannot permit the issuance of illegal bonds. The proposed Refunding Bonds are serial bonds which mature \$300,000 each year 1944 to 1956 and \$200,000 in 1957. These maturities are in direct violation of the statute which require that State Refunding Bonds mature in 25 years, optional after 15 years. Hence, none of these bonds can legally be paid prior to 15 years, which is the minimum period the bonds must run before any of them can be redeemed. Hence the State of Arizona would be

required to default at the fixed maturity dates of the serial bonds and could not legally pay any [232] of them until 1958, or 15 years after the date.

4. No authority exists for the levy or collection of sufficient taxes to pay the principal of the serial refunding bonds as they severally become due. It would require a full period of 25 years before such taxes could be levied each year sufficient to retire these bonds and the State of Arizona would be in default throughout this period due to the statutory limitation upon its amount of taxes which could legally be levied and collected for the payment of the bonds, and the credit of the State irreparably injured.

5. The new refunding bonds, although issued in the form of serial bonds with fixed maturity dates, will in fact be subject to refunding the day after their issuance by the Loan Commissioner and a fraud in effect worked upon the holder of the Refunding Bonds who are entitled to rely upon the fixed maturity dates set forth in the bonds themselves as the exact and only dates upon which their bonds can be paid or redeemed.

6. It is utterly impracticable to issue coupon bonds of the Loan Commissioner which requires the manual and personal signature of the State Treasurer on each of the coupons, or a total of more than 60,000 signatures. No authority of law exists for the State Treasurer to cause such coupons to bear his facsimile signature [233] or to adopt such facsimile signature in lieu of his personal signature."

That said claims of defendants, as and constitut-

ing the Loan Commissioners of the State of Arizona, are, and each of them is, without foundation or merit.

XIII.

That the refusal of said Loan Commissioners to execute and deliver said refunding bonds to the purchasers thereof, as aforesaid, constitutes an unwarranted refusal upon the part of said Loan Commissioners to perform a duty enjoined upon them by the laws of the State of Arizona and because of such refusal the Board of Supervisors of Maricopa County on February 16th, 1943, at a regular meeting of said Board of Supervisors duly called and convened, passed and adopted a resolution authorizing and directing the County Attorney of Maricopa County to institute this original action in mandamus to command said Loan Commissioners to execute and deliver said refunding bonds to the purchasers thereof notwithstanding the refusal of said Loan Commissioners to execute and deliver said refunding bonds to the purchasers thereof, as aforesaid, which resolution of said Board of Supervisors is as follows, to-wit: [234]

“RESOLUTION OF THE BOARD OF SUPERVISORS MARICOPA COUNTY, STATE OF ARIZONA.

Whereas, the Loan Commissioners of the State of Arizona have awarded a contract to Bank of America National Trust & Savings Association, Boettcher and Company, *and Company*, and R. E. Moulton and Company, for the purchase of re-

funding bonds of the State of Arizona in the aggregate principal amount of \$4,100,000 to refund outstanding Maricopa County Highway Bonds in an identical amount; and

Whereas, said Loan Commissioners have notified the Board of Supervisors of Maricopa County, State of Arizona, in writing, that they will refuse to execute and deliver said bonds to said purchasers for the reasons set forth in said notice;

Now Therefore, the County Attorney of Maricopa County is hereby authorized and directed to institute an original suit in mandamus in the Supreme Court of the State of Arizona to command said Loan Commissioners to execute and deliver said bonds to said purchasers pursuant to the demand of the Board of Supervisors of Maricopa County heretofore made upon said Loan Commissioners to refund said outstanding Maricopa County Highway Bonds, for the reason that it will be to the profit and benefit of Maricopa County to refund said outstanding Maricopa County Highway Bonds. [235]

Passed and Adopted by the Board of Supervisors of Maricopa County, Arizona, this 16th day of February, 1943.

BOARD OF SUPERVISORS
OF MARICOPA COUNTY,
ARIZONA.

By JOHN A. FOOTE,
Chairman.

Attest: J. E. DE SOUZA,
Clerk."

XIV.

That the execution and delivery of said refunding bonds to the purchasers thereof for the purpose of redeeming said outstanding Highway Bonds of Maricopa County will inure to the profit and benefit of Maricopa County in that the purchasers of said State of Arizona Refunding Bonds have offered to pay the purchase price therefor in accordance with said bid for bonds bearing interest at the rate of $2\frac{3}{4}$ per cent per annum, payable semi-annually, as compared with interest rates of $5\frac{1}{2}$ per cent and 6 per cent per annum upon the outstanding Highway Bonds of Maricopa County, and, in addition, said purchasers agreed to waive interest upon said State of Arizona Refunding Bonds for a period of 30 days to enable notice of redemption of the outstanding bonds of Maricopa County to be published so that interest on said outstanding bonds would cease to accrue simultaneously [236] with the date of commencement of interest on said State of Arizona Refunding Bonds, and that accordingly upon payment of the purchase price of said State of Arizona Refunding Bonds, the state treasurer would be obligated to publish notice of redemption of said outstanding Highway Bonds of Maricopa County, and on the expiration of 30 days from the date of said publication of notice of redemption, interest on all of said outstanding Maricopa County Highway Bonds would cease and said bonds, upon presentation to the state treasurer of the State of Arizona by the holders thereof would be paid in full. That the

saving in interest to Maricopa County by reason of such sale and delivery of State of Arizona Refunding Bonds and the redemption of said outstanding Highway Bonds pursuant to such notice of redemption will aggregate \$10,000 per month, or \$120,000 per year, and that the execution and delivery of said State of Arizona Refunding Bonds and the publication of notice of redemption of said outstanding Maricopa County Highway Bonds, upon the payment of the purchase price of said refunding bonds, is essential to carry out the duty enjoined by law upon defendants as such Loan Commissioners of the State of Arizona and is in accordance with the resolution of award adopted by said Loan Commissioners, as more particularly alleged in paragraph X hereof, and unless defendants, [237] as such Loan Commissioners, are compelled to execute and deliver said refunding bonds, the sale thereof cannot be consummated or said bonds delivered to the successful bidder or the purchase price thereof paid; that the refusal of said Loan Commissioners to execute and deliver said State of Arizona Refunding Bonds to the purchasers thereof is wholly without authority or sanction of law and that each day that such refusal continues, Maricopa County and the taxpayers thereof are burdened with interest charges accruing on said Maricopa County Highway Bonds at the rate of $5\frac{1}{2}$ per cent and 6 per cent per annum, as against interest at the rate of $2\frac{3}{4}$ per cent per annum which would accrue on said State of Arizona Refunding Bonds when the same are issued and delivered.

That plaintiff has no plain, speedy or adequate remedy in the ordinary course of law, and has no remedy to compel said Loan Commissioners to perform the duty enjoined upon them, and each of them, by law—particularly by Article 4 of Chapter 10, Arizona Code Annotated, 1939—to execute and deliver said State of Arizona Refunding Bonds to the purchaser thereof and to do and perform all necessary acts by law thereunto required of said Loan Commissioners in the redemption of said outstanding Highway Bonds of Maricopa County, save and except by writ of mandamus issued out of this Honorable Court. [238]

XV.

That the circumstances which in the opinion of Plaintiff, Maricopa County, render it proper that the writ of mandamus herein prayed for should issue originally from this Honorable Court in the exercise of its original jurisdiction, rather than from the Superior Court of the County of Maricopa, in the first instance, are as follows, to-wit:

1. After litigation heretofore instituted, the right of Maricopa County to refund its outstanding bonds and to call and redeem the same notwithstanding the fact that said outstanding Highway Bonds of Maricopa County had not yet matured and notwithstanding the fact that none of said bonds provided on its face that it was subject to payment or redemption earlier than the date of payment specified in each bond, had been duly established by judgment and decree of this Hon-

orable Court; that said refunding bonds have now actually been advertised for sale and purchasers ready, able and willing to pay the purchase price thereof have offered to purchase the same bearing interest at only $2\frac{3}{4}$ per cent per annum, and that said Loan Commissioners have awarded said bonds to said purchasers but until the purchase price thereof is paid, the outstanding bonds of Maricopa County cannot be redeemed, with the result that said County is compelled to pay interest [239] at the rate of $5\frac{1}{2}$ per cent and 6 per cent on its outstanding bonds, in lieu of $2\frac{3}{4}$ per cent, the rate of interest borne by the State of Arizona Refunding Bonds; that the issuance of said State of Arizona Refunding Bonds and the redemption of the outstanding Maricopa County Highway Bonds will effect a saving in interest of \$10,000 per month, or \$120,000 per year, and that each day that said Loan Commissioners refuse to execute and deliver said State of Arizona Refunding Bonds effects a loss to Maricopa County and to its taxpayers in excess of \$330. That if plaintiff, Maricopa County, is required to await the decision of the questions herein involved in the ordinary course of trial in the Superior Court and appeal to this Honorable Court, great delay will ensue, to the detriment of plaintiff and its taxpayers.

2. That the bid of said successful bidders is conditioned upon the continued existence of exemption of interest on said Refunding Bonds from federal income taxes; that the Treasury Department of the United States has urged upon the Congress of

the United States to repeal such tax exemption and if the Congress of the United States should repeal such tax exemption, the purchasers of said refunding bonds would be released from their obligation to purchase the same and plaintiff, Maricopa County, would lose the benefit of [240] an advantageous sale of the bonds, and said State of Arizona Refunding Bonds could not thereafter, in the opinion of plaintiff, be sold at such a low interest rate as $2\frac{3}{4}$ per cent per annum, which is only slightly above, to-wit, $\frac{1}{4}$ of 1 per cent, the interest rate borne by Victory Bonds of the United States of America; that if such federal income tax exemption is presently repealed by the Congress of the United States, plaintiff, Maricopa County, may be deprived of the opportunity to refund and redeem, to its benefit and profit at any lower rate of interest, its present outstanding $5\frac{1}{2}$ per cent and 6 per cent Highway Bonds; that the pressure upon the Congress to repeal such tax exemption and the agitation therefor constitutes an urgent and imperative necessity for settling the legal questions raised by the Loan Commissioners which, in the opinion of plaintiff, are without merit.

3. That the issues of law raised in this proceeding are of great public interest and affect the entire State of Arizona and all of the counties, cities and school districts therein, and are such as to warrant and make necessary a consideration and decision thereof by this Honorable Court for the guidance of the public officers of the State and of Maricopa County, and all other public corporations

of the State of Arizona who are similarly situated [241] with respect to the redemption of their outstanding indebtedness.

4. That plaintiff, Maricopa County, is the real party in interest in this proceeding and that defendants, and each of them, are sued herein as public officers, to-wit, as and constituting the Loan Commissioners of the State of Arizona. That the proceedings herein nevertheless affect all taxpayers in Maricopa County and the owners of all property subject to taxation within Maricopa County, as well as the owners and holders of the outstanding Highway Bonds of Maricopa County whose bonds are subject to redemption upon publication of notice of redemption in accordance with the proceedings set forth herein.

Wherefore, plaintiff prays that this Honorable Court issue an alternative writ of mandamus under the seal of this Court commanding defendants, as and constituting the Loan Commissioners of the State of Arizona, to execute and deliver said refunding bonds to the purchasers thereof, to the end that upon payment of the purchase price thereof the state treasurer shall cause notice of redemption of said outstanding bonds of Maricopa County to be given and interest on said outstanding bonds of Maricopa County will cease and terminate 30 days after publication of said notice of redemption, and commanding and requiring said defendants, as and constituting [242] such Loan Commission, to do and perform all other necessary acts required of

said Loan Commissioners by law to redeem said outstanding indebtedness of Maricopa County, or to appear in this Honorable Court on a day certain to show cause why they, and each of them, should not be peremptorily ordered to execute and deliver said refunding bonds to the purchasers thereof, and to do and perform all other necessary acts thereunto required of them by law for the redemption of said outstanding indebtedness of Maricopa County; and for such other and further relief as to this Honorable Court may seem just and meet in the premises.

HAROLD R. SCOVILLE,
County Attorney of Maricopa
County.

LESLIE C. HARDY,
Special Counsel for Maricopa
County. [243]

State of Arizona,
County of Maricopa—ss.

Leslie C. Hardy, first being duly sworn, upon oath deposes and says:

That he is authorized to appear, in association with the County Attorney of Maricopa County, as special counsel for Maricopa County, plaintiff herein, and in such capacity he has read the foregoing petition, knows the contents thereof, and verifies that it is true, except as to matters alleged

therein upon information and belief, and as to such matters, he believes it to be true.

Subscribed and sworn to before me this day
of February, 1943.

Notary Public.

My Commission expires:

[Endorsed]: Pltfs' Exhibit No. One. State of Washington, et al vs. Maricopa County et al. Case No. Civ-379-Phx. Admitted and Filed May 17, 1943. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. [244]

In the United States District Court
For the District of Arizona

April 1943 Term

At Phoenix

MINUTE ENTRY OF
MONDAY, MAY 17, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

Civ-379

[Title of Cause.]

Defendants' Motion for Summary Judgment under Rule 56 (b) comes on regularly for hearing this day.

John L. Gust, Esquire, is present on behalf of the plaintiffs. Leslie C. Hardy, Esquire and Earl

Anderson, Esquire are present on behalf of the defendants.

On motion of John L. Gust, Esquire,

It Is Ordered that John Spilley, Esquire, Assistant Attorney General of the State of Washington, be admitted specially to practice in this case as an Associate Counsel for the plaintiffs.

On motion of John L. Gust, Esquire,

It Is Ordered that plaintiffs be allowed to file Amended Complaint, herein.

On motion of Leslie C. Hardy, Esquire,

It Is Ordered that the defendants' Answer run as to the Amended Complaint, and that the defendants be allowed to file an Amended Answer to the Amended Complaint.

On motion of John L. Gust, Esquire,

It Is Ordered that plaintiffs be allowed to file Affidavit in Opposition to Motion for Summary Judgment. Said counsel for the defendants states no objection to filing thereof at this time and reserves exception to same as being immaterial.

Defendants' Motion for Summary Judgment is now argued by respective [245] counsel.

Leslie C. Hardy, Esquire now files Amended Answer, and on motion of said counsel, John L. Gust, Esquire, consenting thereto,

It Is Ordered that Motion for Summary Judgment be considered as applying to Amended Complaint and Amended Answer as well as other pleadings filed herein.

Motion for Summary Judgment is now argued by respective counsel.

Plaintiffs' exhibit No. 1, Brief in Supreme Court of Arizona, is now admitted in evidence.

Said Motion is now submitted, and by the Court taken under advisement. [246]

In the United States District Court
for the District of Arizona

April 1943 Term

At Phoenix

MINUTE ENTRY OF
FRIDAY, MAY 21, 1943

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

Civ-379

[Title of Cause.]

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

It Is Ordered that Defendants' Motion for Summary Judgment be and it is granted. [247]

In the United States District Court
for the District of Arizona

No. Civil-379-Phoenix

STATE OF WASHINGTON and EQUITABLE
LIFE INSURANCE COMPANY OF IOWA,
Plaintiffs,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED.
OGLESBY and PHIL ISLEY, constituting
the Board of Supervisors of Maricopa County,
Arizona; SIDNEY P. OSBORN, Governor,
ANA FROHMILLER, State Auditor, and
JIM BRUSH, State Treasurer, constituting
the Loan Commissioners of the State of Ari-
zona; JIM BRUSH, State Treasurer, and
ANA FROHMILLER, State Auditor of the
State of Arizona,

Defendants.

SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

Defendants herein having moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the motion for summary judgment having been argued to the Court on May 17, 1943 by counsel for the plaintiffs and defendants, whereupon the said motion for summary judgment was submitted to the Court for decision, and the court, being advised of the law and premises, on May 21, 1943 ordered that said

motion for summary judgment be granted in favor of the defendants:

Now, Therefore, in consideration of the premises,

It Is Ordered Adjudged and Decreed, and the Court does hereby Order, Adjudged and Decree that defendants do have summary judgment in their favor against plaintiffs herein, together with the defendants' costs to be taxed by the Clerk of this Court.

Dated this 24 day of May, 1943.

DAVE W. LING

United States District Judge [248]

Service of a true copy of the foregoing proposed form of Summary Judgment in Favor of Defendants is acknowledged this 24 day of May, 1943, and the same is hereby approved as to form.

GUST, ROSENFELD, DIVEL-
BESS, ROBINETTE &
COOLIDGE

By FRED V. ROSENFELD

Attorneys for Plaintiffs.

[Endorsed]: Filed May 24 1943. [249]

In the United States District Court
for the District of Arizona

April 1943 Term

At Phoenix

MINUTE ENTRY OF
MONDAY, MAY 24, 1943

(Phoenix Civil Order Book)

Honorable Dave W. Ling, United States District
Judge, Presiding.

Civ-379

[Title of Cause.]

SUMMARY JUDGMENT IN FAVOR OF
DEFENDANTS

Defendants herein having moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the motion for summary judgment having been argued to the Court on May 17, 1943 by counsel for the plaintiffs and defendants, whereupon the said motion for summary judgment was submitted to the Court for decision, and the court, being advised of the law and premises, on May 21, 1943 ordered that said motion for summary judgment be granted in favor of the defendants:

Now, Therefore, in consideration of the premises,

It Is Ordered Adjudged and Decreed, and the Court does hereby Order, Adjudge and Decree that defendants do have summary judgment in their favor against plaintiffs herein, together with the

defendants' costs to be taxed by the Clerk of this Court.

Dated this 24 day of May, 1943.

DAVE W. LING

United States District Judge.
[250]

Phoenix Civil Docket
Civ-379

[Title of Cause.]

DOCKET ENTRIES

Filings and Proceedings

Date 1943

May 24—Enter and file Summary Judgment for
defendants together with costs.

Jun 23—File Plaintiffs' Notice of Appeal.

Jun 23—Mail copy of Notice of Appeal to Joe
Conway, to Harold R. Scoville and to
Leslie C. Hardy, attorneys for defend-
ants. [251]

[Title of District Court and Cause.]

NOTICE OF PLAINTIFFS' REQUEST FOR
FINDINGS OF FACT AND CONCLU-
SIONS OF LAW

To the Attorneys for the Defendants in the Above
Entitled Cause:

Please Take Notice That on the 7th day of June,

1943, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, the undersigned attorneys for the plaintiffs herein will appear before the Judge of the above entitled Court, and move that the plaintiffs' request for findings of fact and conclusions of law attached hereto be granted.

A memorandum in support of said request is attached thereto.

Dated this 2nd day of June, 1943.

SMITH TROY,
Attorney General of the
State of Washington.

GUST, ROSENFELD, DIVEL-
BESS, ROBINETTE &
COOLIDGE,
201-11 Professional Building,
Phoenix, Arizona,

By J. L. GUST
Attorneys for Plaintiffs [252]

[Title of District Court and Cause.]

PLAINTIFFS' REQUEST FOR FINDINGS OF
FACT AND CONCLUSIONS OF LAW

Come now State of Washington and Equitable Life Insurance Company of Iowa, the plaintiffs in the above entitled action, and request that the court make findings of fact and conclusions of law

upon which the summary judgment in favor of the defendants, entered on the 24th day of May, 1943, is based.

This request is based upon the memorandum hereto attached.

Dated this 2nd day of June, 1943.

SMITH TROY,

Attorney General of the
State of Washington

GUST, ROSENFELD, DIVEL-
BESS, ROBINETTE &
COOLIDGE

201-11 Professional Building,
Phoenix, Arizona,

By J. L. GUST

Attorneys for Plaintiffs. [253]

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF REQUEST
FOR FINDINGS OF FACT AND CONCLU-
SIONS OF LAW ON SUMMARY JUDG-
MENT FOR DEFENDANTS

While findings of fact and conclusions of law are ordinarily not mandatory on summary judgment, they are proper and may be made by the court with the consent of the parties, or on its own

motion, and may be helpful to the appellate court on review.

Prudential Ins. Co. v. Goldstein, 5 Federal Rules Service, page 586

In this case, the motion for summary judgment stated a number of grounds. Voluminous briefs were filed on both sides and the argument took a wide range. It would undoubtedly help to limit the range of the argument on appeal if the court would make brief findings and conclusions to indicate the grounds of its decision.

Respectfully submitted,

SMITH TROY,

Attorney General of the
State of Washington

GUST, ROSENFELD, DIVEL-
BESS, ROBINETTE &
COOLIDGE

201-11 Professional Building,
Phoenix, Arizona

By J. L. GUST

Attorneys for Plaintiffs [254]

Received copy of within this 2nd day of June,
1943.

LESLIE C. HARDY

Special counsel for Maricopa
Co.

Attorneys for Defendants.

Notice of Plaintiffs' Request for Findings of Fact and Conclusions of Law, and Plaintiffs' Request for Findings of Fact and Conclusions of Law and Memorandum in Support of Request for Findings of Fact and Conclusions of Law on Summary Judgment for Defendants.

[Endorsed]: Filed Jun 2, 1943. [255]

In the United States District Court
for the District of Arizona

April 1943 Term

At Phoenix

MINUTE ENTRY OF
TUESDAY, JUNE 8, 1943

(Phoenix Division)

Honorable DAVE W. LING, United States District
Judge, Presiding.

Civ-379

[Title of Cause.]

ORDER DENYING REQUEST FOR FIND-
INGS OF FACT AND CONCLUSIONS OF
LAW AND ALSO ORDER AMENDING
SUMMARY JUDGMENT

Plaintiffs' Request for Findings of Fact and Conclusions of Law comes on regularly for hearing this day.

John L. Gust, Esquire, appears as counsel for the plaintiffs. Leslie C. Hardy, Esquire, is present

on behalf of the defendants. Said Request is now argued, and

It Is Ordered that said Request be and it is denied.

On motion of Leslie C. Hardy, Esquire, and John L. Gust, Esquire, consenting thereto,

It Is Ordered that the Clerk be directed to amend Summary Judgment herein by changing the date "May 3, 1943" in line 17 thereof to "May 17, 1943." [256]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the State of Washington and Equitable Life Insurance Company of Iowa, the plaintiffs, do hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that certain judgment rendered in the above entitled court and cause on the 24th day of May, 1943, said judgment being entitled,

“Summary Judgment in Favor of Defendants”.

Dated the 23rd day of June, 1943.

SMITH TROY,

Attorney General, of the
State of Washington,
Olympia, Wash.,

By JOHN SPILLER

Assistant Attorney General
Attorney for the appellant,
State of Washington. [257]

GUST, ROSENFELD, DIVEL-
BESS, ROBINETTE &
COOLIDGE,

201-11 Professional Building,
Phoenix, Arizona,

By J. L. GUST

Attorneys for appellant,
Equitable Life Insurance
Company of Iowa.

Received copy of within this 23 day of June,
1943.

LESLIE C. HARDY

Special counsel
Attorneys for

[Endorsed]: Filed Jun 23 1943. [258]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, State of Washington, and Equitable Life Insurance Company of Iowa, the plaintiffs above named, as principals, and Fidelity & Deposit Company of Maryland, as Surety, are held and firmly bound unto Maricopa County; John A. Foote, Ed. Oglesby and Phil Isley, Constituting the Board of Supervisors of Maricopa County, Arizona; Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor, and Jim Brush, State Treasurer, Constituting the Loan Commissioners of the State of Arizona; Jim Brush, State Treasurer, and Ana Frohmiller, State Auditor of the State of Arizona, defendants above named, in the sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States, to be paid to the said Maricopa County; John A. Foote, [259] Ed. Oglesby and Phil Isley, Constituting the Board of Supervisors of Maricopa County, Arizona; Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor, and Jim Brush, State Treasurer, Constituting the Loan Commissioners of the State of Arizona; Jim Brush, State Treasurer, and Ana Frohmiller, State Auditor, of the State of Arizona, for which payment well and truly to be made we bind ourselves and our successors, firmly by these presents.

The condition of This Obligation Is Such That,

Whereas, a certain Judgment, entitled, "Summary Judgment in Favor of Defendants", was rendered and entered on the 23rd day of May, 1943, in the above entitled court and cause, and

Whereas, the same was in favor of the above named defendants and against the principals on this bond, and

Whereas, the said principals have appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from said judgment;

Now, Therefore, if the said principals above named shall prosecute their said appeal with effect, and shall pay all costs which have accrued in the United States District Court for the District of Arizona, and which may accrue in the United States Circuit Court of Appeals, for the Ninth Circuit, then this obligation shall be void; otherwise, it shall remain in full force and effect.

In Witness Whereof, said principals and surety

have executed these presents on this 23rd day of June, 1943.

STATE OF WASHINGTON,
EQUITABLE LIFE INSUR-
ANCE COMPANY OF IOWA,

By J. L. GUST

Their Attorney

Principals. [260]

FIDELITY & DEPOSIT COM-
PANY OF MARYLAND,

[Seal] By J. A. MURPHY

Attorney-in-Fact

Surety.

Received copy of within this 23 day of June,
1943.

LESLIE C. HARDY

Special Counsel

Attorneys for

[Endorsed]: Filed Jun 23, 1943. [261]

[Title of District Court and Cause.]

STATEMENT OF POINTS BY PLAINTIFFS
UPON WHICH THEY RELY FOR A RE-
VERSAL OF THE JUDGMENT

I.

The mandamus proceedings in the state court, to which no bondholders were parties, do not bar this

suit which is brought by bondholders to establish their rights.

II.

The fact that counsel for plaintiffs in this suit filed a brief in the first mandamus suit in the state court, in the interest of an unnamed bondholder not a party to this suit, did not make the judgment rendered in that suit binding upon all of the bondholders upon the theory of a class suit.

III.

The law declared by the Supreme Court of Arizona in [262] the mandamus suits to which no bondholders were parties, is not binding upon the federal courts in a suit such as this, which is brought by bondholders to establish their rights, for the reason that the jurisdiction of the federal courts in this case is based primarily upon questions arising under the Constitution and laws of the United States.

IV.

The rule declared by the Supreme Court of the United States in the case of, *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, has no application to this case, for the reason that that rule does not apply to cases arising under the Constitution and laws of the United States.

V.

The decision of the Circuit Court of Appeals of the Ninth Circuit, in the case of *Toole County v. Moody*, 125 Fed. (2d) 498, has no application to this case, for the reason that that decision has no

application to cases arising under the Constitution and laws of the United States.

VI.

That Title I, Chapter 52, Revised Statutes of Arizona, under which defendants claim the right to refund plaintiffs' bonds is a reenactment of an Act of Congress, enacted while Arizona was a Territory, so defendants asserted right to refund depends upon the construction of an Act of Congress.

VII.

That the Supreme Court of Arizona, in the two mandamus suits, did not consider the questions upon which plaintiffs' case is based.

VIII.

The complaint in this case shows that defendants are proposing to call plaintiffs' bonds before their due dates by refunding them under laws which impair the obligation of the [263] contract created by the issuance of plaintiffs' bonds. That a contract was created by the issuance of the bonds is admitted. Plaintiffs claim that under that contract their bonds were authorized to be issued with definite due dates, and were issued with such dates, and that there was no provision in the laws of the State of Arizona at that time authorizing the refunding of such bonds before their due dates, and hence, a contract was created by the issuance of said bonds by which the defendant, Maricopa County, became obligated by virtue of said contract to pay the interest on said bonds at the agreed rate

until their due dates and until they were retired after their due dates.

IX.

That the law under which refunding bonds are proposed to be issued is Article 4 of Chapter 10 of the Arizona Code Annotated, 1939, and said Article first became a law of the State of Arizona as Article 4 of Chapter 60, Arizona Revised Code of 1928. Thus said Act was first enacted by the Legislature of the State of Arizona in 1928, seven or eight years after plaintiffs' bonds were issued, and constitutes a law impairing the obligation of the contract created by the issuance of the bonds.

X.

Article 4 of Chapter 60, Arizona Revised Code of 1928, is a new enactment, and not a reenactment of formerly existing law, and the attempt to call plaintiffs' bonds before their due dates under said Article, as the same has been reenacted in the 1939 Annotated Code, constitutes an attempt to impair the obligation of the contract created by the issuance of plaintiffs' bonds by the use of said Article 4.

XI.

The bonds of the plaintiffs and the coupons attached thereto provide for the payment of interest thereon at the rate therein specified until their respective due dates. The [264] defendants claim the right to stop the payment of the interest by virtue of certain resolutions of the Loan Commissioners of the State of Arizona, and the Board of

Supervisors of Maricopa County. Without these resolutions, plaintiffs' bonds would remain outstanding until their due dates. Hence, it is these resolutions that impair the obligation of the contract created by the issuance of plaintiffs' bonds. Such resolutions adopted by municipal boards or commissions in pursuance of state authority are laws within the meaning of Section 10 of Article One, of the Federal Constitution.

XII.

The bonds of the plaintiffs were issued under Chapter 2, Title 52, Revised Statutes of 1913. Said bonds are made payable upon fixed due dates, in exact compliance with the terms of said chapter. The claim of the defendants that said bonds may be refunded and retired before their due date under Chapter 1 of Title 52, Revised Statutes of 1913, is not well founded, for the reason that the Revised Statutes of 1913, as is shown by Chapter 64 of the Acts of the Third Special Session of the First Legislature of Arizona, constitute merely a compilation of existing statutes, and not a revised code, and any provision in Chapter 1 of Title 52, that is inconsistent with Title 2 of said Chapter 52, was repealed by the enactment of said Chapter 2, as Chapter 20 of the Acts of the Third Special Session of the First Legislature of the State of Arizona, Title 1, Chapter 52, of the Revised Statutes of 1913, having been enacted at sessions of the First Legislature of the State of Arizona, prior to said Third Special Session.

XIII.

That Chapter 1, Title 52, Revised Statutes of Arizona, 1913, insofar as it covered the same subject as Chapter 2, Title 52 of said Revised Statutes, was repealed by the said Chapter 2, [265] by virtue of the provisions of Chapter 19 of the Third Special Session of the First Legislature of the State of Arizona.

XIV.

Chapter 1, Title 52, of the Revised Statutes of 1913, is held by the Supreme Court of Arizona to be merely a continuation of Acts of Congress enacted during early Territorial days, providing for the refunding of state, county and municipal indebtedness, which statutes were by their terms limited to indebtedness existing January 1st, 1897, and that no indebtedness existing after said date was ever authorized to be refunded by the Territorial statutes, and that the enactment of Title 1, Chapter 52, of the Revised Statutes of 1913, by the First Legislature of the State of Arizona, was merely a reenactment of former existing Territorial statutes, and did not authorize the refunding of any indebtedness created since statehood.

XV.

That Chapter 1, Title 52, Revised Statutes of 1913, as it existed from its original enactment in 1912, to the enactment of the Arizona Revised Code of 1928, provided that bonds issued thereunder should be obligations of the State or Arizona, and hence, could not be held operative as to county,

municipal or school district indebtedness, because, under the Constitution of Arizona, the State of Arizona was not permitted to create indebtedness for such purpose.

XVI.

That the provisions of plaintiffs' bonds constitute the contract between Maricopa County and the holders of said bonds for the reason that after their form was determined and had become a matter of public record, the legislature of the State of Arizona ratified and approved said bonds, and ratified and approved the contract entered into by the county with the original purchasers, and that said ratifying acts excluded all [266] application of Chapter 1, Title 52, Revised Statutes of 1913, from said bonds.

XVII.

That the entire history of Title 1, Chapter 52, Revised Statutes of 1913, both before the enactment of said chapter and after the enactment of said chapter, shows conclusively that said chapter was never intended to apply to bonds issued under Chapter 2, Title 52, Revised Statutes of 1913.

XVIII.

That the several acts enacted by the State of Arizona, providing for the issuance of refunding bonds, constitute an interpretation of Chapter 1, Title 52, Revised Statutes of 1913, precluding the calling of outstanding bonds before their due dates by use of the refunding provisions of said chapter.

XIX.

That the decisions of the Supreme Court of Arizona, in the mandamus suits, if considered as upholding defendants' contention, depart so far from recognized rules of interpretation of statutes as to deprive plaintiffs of their property without due process of law.

XX.

The complaint in this case states a proper case for a declaratory judgment suit.

Dated: June 23, 1943.

STATE OF WASHINGTON,

EQUITABLE LIFE INSUR-
ANCE COMPANY OF IOWA

By J. L. GUST

Their Attorney

Received copy of within this 23 day of June, 1943.

LESLIE C. HARDY,
Special Counsel

[Endorsed]: Filed Jun 23 1943. [267]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE REC-
ORD AND PROCEEDINGS TO BE CON-
TAINED IN RECORD ON APPEAL

Come now the above named plaintiffs and appellants, and designate the following portions of the record and proceedings to be contained in the record on appeal:

1. Amended Complaint.
2. Amended Answer of Defendants to Amended Complaint.
3. Notice of Motion for Summary Judgment.
4. Motion for Summary Judgment.
5. Affidavit of Leslie C. Hardy, in support of Motion for Summary Judgment.
6. Affidavit of Earl Anderson, in support of Motion for Summary Judgment. [268]
7. Affidavit in Opposition to Motion for Summary Judgment, with certified copy of Acts of First Legislature of Arizona attached thereto.
8. Plaintiffs' Exhibit 1, being Petition for Writ of Mandamus, in the case of Maricopa County, etc., v. Sidney P. Osborn, et al, in the Supreme Court of Arizona.
9. Summary Judgment in favor of defendants, signed by the court and filed in said cause.
10. The Clerk's notation of Judgment in the civil docket.
11. Final Judgment, as entered by the Clerk in the Civil Order book.
12. Notice of Plaintiffs' Request for Findings of Fact and Conclusions of Law.
13. Plaintiffs' Request for Findings of Fact and Conclusions of Law.
14. All Minute Entries made by the Clerk in said cause.
15. Notice of Appeal.
16. Appeal Bond.
17. This Designation.
18. Statement of Points by Plaintiffs upon which they Rely for a Reversal of the Judgment.

Dated this 23rd day of June, 1943.

STATE OF WASHINGTON and
EQUITABLE LIFE INSUR-
ANCE COMPANY OF IOWA,
Plaintiffs and Appellants,
JOHN SPILLER

By J. L. GUST
GUST ROSENFELD DIVEL-
BESS ROBINETTE & COOL-
IDGE
Their Attorneys

Received copy of within this 23 day of June, 1943.
LESLIE C. HARDY,
Special Counsel

[Endorsed]: Filed Jun 23 1943. [269]

[Title of District Court and Cause.]

DEFENDANTS' DESIGNATION OF ADDI-
TIONAL PORTION OF RECORD AND
PROCEEDINGS TO BE CONTAINED
IN RECORD OF APPEAL AS PROVIDED
BY RULE 75(a) OF FEDERAL RULES OF
CIVIL PROCEDURE

Come Now the above named defendants and ap-
pellees and designate the following additional por-
tions of the record and proceedings to be contained
in the record on appeal herein:

Original Complaint, filed March 31, 1943.

Dated this 25th day of June, 1943.

HAROLD R. SCOVILLE

Maricopa County Attorney

LESLIE C. HARDY

Special Counsel for Maricopa
County

Attorneys for the Defendants Maricopa County
and the Officials of Maricopa County,
Arizona.

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney Gen-
eral

Attorneys for the Defendants Who Are Offi-
cials of the State of Arizona.

Received copy of the within designation of Addi-
tional Portion of Record and Proceedings, this 25th
day of June, 1943.

JOHN SPILLER

JOHN L. GUST

Attorneys for Plaintiffs.

[Endorsed]: Filed Jun 25 1943. [270]

In the United States District Court
For the District of Arizona

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the case of State of Washington, et al, Plaintiffs, versus Maricopa County, et al, Defendants, numbered Civ-379 Phoenix, on the docket of said court.

I further certify that the attached pages, numbered 1 to 270, inclusive, contain a full, true and correct transcript of all of the proceedings had in said cause and of all the papers filed therein, together with the endorsements of filing thereon, called for in Plaintiffs' Designation of Portions of the Record and Proceedings to be Contained in Record on Appeal and in Defendants' Designation of Additional Portion of Record and Proceedings to be Contained in Record on Appeal, as the same appear from the originals of record remaining on file in my office as such Clerk in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record

amounts to the sum of \$45.75 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said court this 12th day of July, 1943.

[Seal]

EDWARD W. SCRUGGS,
Clerk

By WM. H. LOVELESS
Chief Deputy Clerk. [271]

[Endorsed]: No. 10493. United States Circuit Court of Appeals for the Ninth Circuit. State of Washington and Equitable Life Insurance Company of Iowa, Appellants, vs. Maricopa County; John A. Foote, Ed. Oglesby and Phil Isley, Constituting the Board of Supervisors of Maricopa County, Arizona; Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor, and Jim Brush, State Treasurer, Constituting the Loan Commissioners of the State of Arizona; Jim Brush, State Treasurer, and Ana Frohmiller, State Auditor of the State of Arizona, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed July 15, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10493

STATE OF WASHINGTON and EQUITABLE
LIFE INSURANCE COMPANY OF IOWA,

Appellants,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED
OGLESBY and PHIL ISLEY, constituting
the Board of Supervisors of Maricopa County,
Arizona; SIDNEY P. OSBORN, Governor,
ANA FROHMILLER, State Auditor, and
JIM BRUSH, State Treasurer, Constituting
the Loan Commissioners of the State of Ari-
zona; JIM BRUSH, State Treasurer, and ANA
FROHMILLER, State Auditor of the State of
Arizona,

Appellees.

STIPULATION CONCERNING TRANSCRIPT
OF RECORD ON APPEAL

Whereas, the transcript of record on the appeal herein, certified by the Clerk of the United States District Court for the District of Arizona, discloses from the designation of the contents of record on said appeal that the Clerk of said District Court was requested to transmit to said Circuit Court of Appeals, among other documents, the original complaint filed in said action in the United

States District Court as well as the Amended Complaint filed in said action,

It Is Therefore Now Stipulated by the undersigned counsel for the appellants and appellees herein, that said original complaint transmitted from the United States District Court to the Circuit Court of Appeals for the Ninth Circuit need not be printed as a part of the transcript of record in said Circuit Court of Appeals but shall be considered as a part of the record on appeal as an original exhibit and may be referred to by either of the parties upon said appeal.

Dated at Phoenix, Arizona, this 2nd day of July, 1943.

TROY SMITH

Attorney General of State of
Washington

By JOHN SPILLER

Deputy

GUST ROSENFELD DIVEL-
BESS ROBINETTE & COOL-
IDGE

By J. L. GUST,

Attorneys for Appellants

HAROLD R. SCOVILLE

Maricopa County Attorney

LESLIE C. HARDY

Special Counsel for Maricopa
County

Attorneys for Appellees Maricopa County and
the Officials of Maricopa County, Arizona.

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney Gen-
eralAttorneys for Appellees who are officials of the
State of Arizona.

[Endorsed]: Filed July 15, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL AND DESIGNATION OF THE
PARTS OF THE RECORD WHICH AP-
PELLANTS THINK NECESSARY FOR
CONSIDERATION OF SAID POINTS

Comes Now the State of Washington and Equitable Life Insurance Company of Iowa, appellants in the above-entitled case, and hereby formally adopt the statement of points by plaintiffs upon which they rely for a reversal of the judgment filed by the appellants as plaintiffs in the United States District Court for the District of Arizona, which is a part of the record forwarded to this court by the Clerk of the United States District Court, as and for a statement of the points on which appellants intend to rely on this appeal, required to be filed in this court under Subdivision 6 of Rule 19 of the Rules of this court, and said appel-

lants hereby designate to be printed the whole of the record forwarded to this court by the Clerk of the United States District Court, excepting only the original complaint filed March 31, 1943, which need not be printed under the stipulation entered into by counsel for appellants and appellees.

Dated this 17th day of July, 1943.

SMITH TROY,

Attorney General, of the State of
Washington, Olympia,
Washington

By JOHN SPILLER

Assistant Attorney General
Attorney for the appellant,
State of Washington.

GUST, ROSENFELD, DIVEL-
BESS, ROBINETTE & COOL-
IDGE

201 Professional Building,
Phoenix, Arizona,

By J. L. GUST

Attorneys for appellant,
Equitable Life Insurance
Company of Iowa.

Service of the above designation of points upon which appellants intend to rely and designation of parts of the record to be printed is hereby acknowledged this 17th day of July, 1943.

HAROLD R. SCOVILLE

Maricopa County Attorney

LESLIE C. HARDY

Special Counsel for Maricopa
County

Attorneys for the Defendants Maricopa County
and the Officials of Maricopa County, Ari-
zona.

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney Gen-
eral

Attorneys for the Defendants Who Are Offi-
cials of the State of Arizona.

[Endorsed]: Filed July 20, 1943. Paul P.
O'Brien, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON and EQUITABLE
LIFE INSURANCE COMPANY OF IOWA,
Appellants,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED
OGLESBY and PHIL ISLEY, constituting the
Board of Supervisors of Maricopa County, Arizona;
SIDNEY P. OSBORN, Governor, ANA FROH-
MILLER, State Auditor, and JIM BRUSH, State
Treasurer, constituting the Loan Commissioners of
the State of Arizona; JIM BRUSH, State Treas-
urer, and ANA FROHMILLER, State Auditor of
the State of Arizona,
Appellees.

APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANTS

SMITH TROY, Attorney General,
State of Washington; JOHN
SPILLER, Assistant Attorney
General, Olympia, Washington,
Attorneys for Appellant
STATE OF WASHINGTON.

WOOD, HOFFMAN, KING and
DAWSON; DAVID M. WOOD,
48 Wall Street, New York, New
York,

GUST, ROSENFELD, DIVEL-
BESS, ROBINETTE & COOL-
IDGE; J. L. GUST, 201 Pro-
fessional Building, Phoenix, Ari-
zona,

Attorneys for Appellant
EQUITABLE LIFE INSUR-
ANCE COMPANY OF IOWA.

FILED

OCT 1 - 1943

PAUL P. O'BRIEN,
CLERK

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United States
Circuit Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON and EQUITABLE
LIFE INSURANCE COMPANY OF IOWA,
Appellants,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED
OGLESBY and PHIL ISLEY, constituting the
Board of Supervisors of Maricopa County, Arizona;
SIDNEY P. OSBORN, Governor, ANA FROH-
MILLER, State Auditor, and JIM BRUSH, State
Treasurer, constituting the Loan Commissioners of
the State of Arizona; JIM BRUSH, State Treas-
urer, and ANA FROHMILLER, State Auditor of
the State of Arizona,
Appellees.

BRIEF OF APPELLANTS

Note: The parties will be referred to by their designations in the District Court, viz, appellants as plaintiffs and appellees as defendants. References to the transcript of record will be indicated by the letter T. followed by page number.

PRELIMINARY STATEMENT

Plaintiffs brought this suit in the United States District Court for the District of Arizona at Phoenix, seeking a declaratory judgment against the defendants to the effect that certain highway improvement bonds issued by defendant, Maricopa County, in the years 1919 and 1921, and not yet due according to their terms, were non-callable and that said defendant was legally obligated to continue to pay the interest thereon until their respective due dates. The defendants have taken steps to refund these bonds under existing statutes of the State of Arizona enacted after the issuance of the bonds. These refunding proceedings have been sustained by the Supreme Court of Arizona in mandamus suits to which neither plaintiffs nor any other bondholders were parties. The plaintiffs invoke the jurisdiction of the Federal Courts principally upon the ground that the statute and the resolutions of the defendants under which the refunding is proposed as construed by the Supreme Court of Arizona impair the obligations of the contract created by the issuance of the bonds. The principal issue is the construction of the bond contract, the Supreme Court of Arizona holding that notwithstanding the definite due dates authorized by Chapter 2, Title 52, Arizona Revised Statutes of 1913, the bonds were subject to refunding under the provisions of Chapter 1, Title 52, of said Revised Statutes and the plaintiffs contesting this. The defendants filed a motion for summary judgment which was granted by the court without making findings of fact or conclusions of law and without opinion.

STATEMENT OF JURISDICTION

1. *Jurisdiction of District Court*(a) *Jurisdiction as to both plaintiffs.*

The complaint alleges that jurisdiction of the District Court is invoked upon the ground that this is a case arising under the Constitution and Laws of the United States (T. 4). The complaint shows that the bonds upon which the action is based were issued in 1919 and 1921 to run for a term of years (T. 11, 21); that those bonds which have become due have been paid and those which are not yet due are proposed to be refunded and redeemed under Article 4, Chapter 10, Arizona Code Annotated 1939 (T. 30, 31); that said Article 4, Chapter 10, first became a law of the State of Arizona as a new enactment and not as a re-enactment or revision of an existing statute, as Article 4, Chapter 60, Arizona Revised Code of 1928, on the first day of July, 1929, some seven or eight years after the issuance of plaintiffs' bonds (T. 36, 37); that Chapter 2, Title 52, Arizona Revised Statutes 1913, under which plaintiffs' bonds were issued provided for bonds with definite maturity dates (T. 7-10); that Chapter 1, Title 52, of said Revised Statutes was not susceptible of a construction authorizing the refunding of bonds issued under said Chapter 2 (T. 39-40); and that if there existed any right to refund such bonds under the laws of Arizona, it was excluded by acts of the legislature of the state validating the particular issues after the

form of bond was adopted and placed of record (T. 39); that the decisions of the Supreme Court of Arizona in the mandamus suits are not binding upon the plaintiffs because no bondholders were parties thereto and that many questions presented in this suit were not considered by the Supreme Court of Arizona (T. 57); that the plaintiffs paid large premiums on their bonds for the right to collect the rate of interest therein specified until their due dates (T. 20-21, 29-30); and that to deprive the plaintiffs of this right by calling the bonds will impair the obligation of the plaintiffs' contract and deprive them of their property without due process of law (T. 56). It is plain that the facts alleged present federal questions under Title 28, Section 41, United States Code Annotated, said federal questions arising out of Section 10, Article 1, United States Constitution (impairing obligation of contracts) and Section 1 of the Fourteenth Amendment to the United States Constitution (due process of law). The complaint alleges that the loss each plaintiff will sustain if the bonds are presently called for redemption as proposed by defendants, will exceed the jurisdictional amount of \$3000.00 (T. 6, 7).

(b) *Jurisdiction as to State of Washington*

One of the plaintiffs is a sovereign state. While this plaintiff might have resorted to the original jurisdiction of the United States Supreme Court (Sec. 2, Article 3, United States Constitution), under the federal statutes it has the same right as an individual to bring an ac-

tion in the District Court, under Title 28, United States Code Annotated, Section 41. This right is recognized by Title 28, United States Code Annotated, Section 341, which so far as applicable reads as follows:

“The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party except between a state and its citizens or between a state and citizens of other states or aliens, in which latter cases it shall have original but not exclusive jurisdiction.”

The jurisdiction of the District Court to entertain actions to which a state is a party has often been sustained.

Ames v. Kansas, 111 U. S. 449, 463, 470, 28 L. ed. 482, 4 Sup. Ct. Rep. 437,

U. S. v. Louisiana, 123 U. S. 32, 36, 31 L. ed. 69, 8 Sup. Ct. Rep. 17,

U. S. v. California, 297 U. S. 175, 80 L. ed. 567, 574, 56 Sup. Ct. Rep. 421,

U. S. v. 40 Acres of Land, 24 Fed. Sup. 390,

U. S. v. 4450.72 Acres of Land, 27 Fed. Sup. 167, 176.

(c) *Jurisdiction Under Declaratory Judgment Act*

The relief sought is under the Declaratory Judgment Act. (T. 58) An actual controversy exists, for while there is yet no default in payment of interest on plaintiffs' bonds, proceedings

are pending under which it is declared payment of interest shall cease thirty days after the prescribed notice is given (T. 125). The jurisdiction of the federal courts to entertain a suit for declaratory judgment on this state of facts is established.

28 U. S. Code, Anno. 400,

Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U. S. 270, 85 L. ed. 826, 61 Sup. Ct. Rep. 510,

Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 81 L. ed. 617, 57 Sup. Ct. Rep. 461,

Stoner v. New York Life Ins. Co., 311 U. S. 464, 85 L. ed. 284, 286, 61 Sup. Ct. Rep. 336.

It will be noted that in the instant case federal questions are involved and that the plaintiffs were not parties to the actions in the state court so that no question of adjudication by the state court or of relinquishing jurisdiction to the state court can arise. The cases above cited under this heading show that the federal court does have jurisdiction and will entertain a declaratory judgment suit on facts such as we have in the instant case.

2. *Jurisdiction of Circuit Court of Appeals*

The judgment rendered in this case is a summary judgment rendered pursuant to Rule 56 of the Rules of Civil Procedure and is a final judgment (T. 221-223).

28 U. S. Code Anno. 400

Appeal therefrom lies under 28 U. S. Code Anno. Sec. 225, the general statute on appeal, and within the time limit allowed by 28 U. S. Code Anno. Sec. 230. Notice of appeal was seasonably given and appeal bond filed (T. 229-231).

STATEMENTS OF FACTS

1. *Statement of Proceedings in District Court*

This is an appeal from a summary judgment (T. 221-223) rendered by the United States District Court for the State of Arizona against the plaintiffs on defendants' motion on an amended complaint (T. 3) seeking a declaration that certain bonds issued by defendant, Maricopa County, in 1919 and 1921, are non-callable until the due dates of the bonds. The District Judge made no findings of fact nor conclusions of law. Presumably the judgment is based upon two decisions of the Arizona Supreme Court directing the defendants, State Loan Commissioners, to issue refunding bonds for the purpose of calling the two issues of bonds of which the bonds held by plaintiffs are a part.

See: Maricopa County v. Osborn, 125 P. (2d) 703, Maricopa County v. Osborn, 136 P. (2d) 270 (Adv.)

The District Court in making its decision on the motion for summary judgment had before it: Plaintiffs' amended complaint (T. 3-67), defendants' amended answer to amended complaint (T. 67-79), affidavits

of Leslie C. Hardy and Earl Anderson in support of motion for summary judgment (T. 85-133), affidavit in opposition to motion for summary judgment (T. 134-166) and plaintiffs' Exhibit One, being Petition for Writ of Mandamus in the second of the above mentioned mandamus cases (T. 167-218). There are no disputed questions of fact. The case depends wholly upon the scope and extent of the jurisdiction of the federal courts in cases of this kind and the meaning and effect of certain statutes of the State of Arizona, and the resolutions adopted by the defendants and the acts performed by them in pursuance of such statutes. The ultimate question to be answered by this court is, "are plaintiffs' rights under Section 10 of Article I. and the Fourteenth Amendment to the Federal Constitution being violated by the statutes of Arizona, the resolutions of the defendants and the steps taken and about to be taken by defendants by direction of the Supreme Court of Arizona in pursuance of such statutes and resolution?"

2. *Statement of Facts Constituting the Basis of Plaintiffs' Cause of Action*

The bonds involved in this suit are of two issues: (1) An issue of Maricopa County Highway Bonds authorized May 17, 1919, and issued in 1919 (T. 11-20), and (2) An issue of Maricopa County Highway Bonds authorized December 31, 1920, and issued in 1921 (T. 21-29). Plaintiff, State of Washington, owns \$31,000 par value of the first issue and \$205,000 par value of the second issue (T. 4-6). Plaintiff, Equitable Life Insurance Company, owns \$91,000 par value of the first issue (T. 6-7). The bonds of each

issue were expressly made payable on certain specific due dates (T. 59, 63) extending over a period of years. The resolutions calling the election for the bonds published as a notice of election (T. 13, 23) expressly stated the number of years each bond was to run (T. 12, 21) and the electors of the county, by their vote, approved bonds running for such terms (T. 13, 23) and maturing at the end thereof. The resolution canvassing the returns of the election and authorizing the issuance of the bonds, which was recorded (T. 13-23) as required by statute, contained the same statement (T. 14-23). That the bonds were issued and the proceedings for the issuance thereof were in exact compliance with the then existing statutes of Arizona will be hereafter pointed out more in detail in our argument.

All of the bonds that have become due have been paid by the county (T. 30) and the interest coupons that have matured have been paid (T. 30). The County of Maricopa is not embarrassed by lack of funds. There yet remain outstanding \$1,700,000 bonds (T. 173) of the first issue which become due serially ending with the year 1949 (T. 173) and \$2,400,000 bonds (T. 173) of the second issue which become due serially ending with the year 1951 (T. 174). Plaintiffs' bonds are a part of those outstanding and not yet due (T. 5, 6). The interest rate on the first issue is $5\frac{1}{2}$ per cent per annum, and on the second issue 6 per cent per annum (T. 5). Each of the plaintiffs purchased its bonds in the open market and paid a large premium thereon in reliance upon the agreement of the County to pay interest on the several bonds until their due dates (T. 20, 30) which agreement was expressed in the bonds (T. 59, 63) and coupons (T.

16, 26) and authorized by the resolutions of the Board of Supervisors and the statutes of the state, and by the electors of the county at the election authorizing the issuance of the bonds (T. 13, 23).

Prior to the year 1942, no contention was ever advanced that these bonds were callable prior to their due dates (T. 17, 27). Subsequent to the issuance of these bonds, the legislature of the state passed several refunding acts limiting the refunding of State, County, Municipal and School District bonds to bonds which had become callable under provisions therein contained (T. 34) and thereby recognized the fact that bonds such as those involved in this case which contain no provision for call are not refundable before they become due. In the year 1942 the board of supervisors of Maricopa County passed a resolution requesting the State Loan Commissioners of the State of Arizona to refund the outstanding remainder of these two issues of bonds (T. 30) at a lower rate of interest, under the provisions of Article 4, Chapter 10, Arizona Annotated Code of 1939. This article first became effective as a law of the State on July 1, 1929 (T. 36) as Article 4 of Chapter 60, Arizona Revised Code of 1928, respectively, ten and eight year after the bonds involved in this case were issued. The State Loan Commissioners declined to proceed whereupon Maricopa County brought an original mandamus proceeding in the State Supreme Court to compel the State Loan Commissioners to proceed with the refunding (T. 31). To this proceeding no bondholder was made a party (T. 31). Such original proceeding can be brought against state officers only, and it is doubtful if any bondholder could be made a party, or could intervene. *Amici curiae* briefs were filed, one of

which is attached to the affidavit of Leslie C. Hardy filed in support of defendants' motion for summary judgment. This brief shows it was filed purely as an *amicus curiae* brief (T. 96) and shows that the attorneys filing the brief represent only one bondholder (T. 112). This bondholder was not one of the plaintiffs in this case. Said brief fails to present many of the contentions urged by plaintiffs in this case (T. 96-113). The Supreme Court of Arizona rendered its opinion directing the writ to issue commanding the defendants, State Loan Commissioners, to proceed with the refunding (T. 31). No appeal or writ of *certiorari* to the Supreme Court of the United States was taken by the defendants, State Loan Commissioners. *Amici curiae* under the practice of the Supreme Court of Arizona have no control over the proceedings and are not allowed to participate in the argument before the court. Their recognition goes only to the extent of being permitted to file a brief to advise the court on the issues made by the parties. Most of the material issues of this case were not presented to the Supreme Court of Arizona in said *mandamus* suit, (*Maricopa County vs. Osborn*, 125 P. (2nd) 703). After said decision of the Supreme Court of Arizona, the Board of Supervisors of Maricopa County again demanded that the State Loan Commissioners proceed with the refunding of said bonds (T. 31). Said Loan Commissioners thereupon adopted a resolution calling for bids for such refunding (T. 31). One bid was received (T. 31). This was accepted by the State Loan Commissioners with the approval of Maricopa County (T. 31). The bidder requested a further proceeding in the State Supreme Court to establish the legal validity of the refunding bonds, and to de-

termine what notice must be given to call the outstanding bonds to stop payment of interest thereon (T. 31). Thereupon a further original mandamus suit was brought in the State Supreme Court in which Maricopa County was sole plaintiff, and the State Loan Commissioners were the only defendants (T. 32). Said suit was brought not to grant a hearing upon or consideration of the rights of the holders of the outstanding bonds, but to obtain a declaration from the Supreme Court of Arizona as to the validity of the proposed refunding bonds (T. 32). The questions submitted to the Supreme Court of Arizona in said suit were limited to the following: (1) No profit would result to the county from the issuance of the refunding bonds by reason of the fact that the outstanding bonds were not callable and payment of interest thereon would not cease until they became due according to their terms; (2) that there was no form or method of notice provided for calling the outstanding bonds; (3) that the maturities of the proposed refunding bonds were not in accordance with the statute; (4) that no authority existed in the statute for the levy of sufficient taxes to retire the proposed new bonds according to their terms; (5) that the refunding bonds would be subject to refunding the day after their issuance; and (6) that the law required the manual and personal signature of the Treasurer to all the coupons, and this was physically impossible (T. 32-33).

The Supreme Court determined the particular questions in favor of the county, and directed that the writ issue commanding that the State Loan Commissioners proceed with the refunding.

Maricopa County vs. Osborn, 136 Pac. (2nd) 270 (Adv.)

After the complaint in the last mandamus suit was filed, but before the decision therein was rendered, plaintiffs filed this suit in the United States District Court of Arizona. Before this case was argued in the United States District Court, the Supreme Court of Arizona rendered its judgment in the mandamus suit last above mentioned, and plaintiffs herein thereupon filed their amended complaint and defendants filed their amended answer to amended complaint (T. 67) in which they set up the decision of the Supreme Court of Arizona in the said two mandamus suits (T. 72-74).

STATUTES TO BE CONSTRUED

There are three Arizona statutes which are principally involved in the decision of this case. The effect of these statutes is alleged in the amended complaint. The following is a review thereof:

1. Chapter 2, Title 52, Arizona Revised Statutes of 1913, which is the act under which all the bonds involved in this case were issued. (T. 135-156.)

2. Chapter 1, Title 52, Arizona Revised Statutes 1913 which defendants claim authorized the refunding and calling of the bonds involved in this case at the time of their issuance, (Exhibit F this brief.)

3. Article 4, Chapter 10, Arizona Code Annotated 1939, originally enacted as Article 4, Chapter 60, Arizona Revised Code of 1928, under which defendants propose to issue the refunding bonds.

The first statute above mentioned, to-wit, Chapter 2, Title 52, Arizona Revised Statutes of 1913, is the statute under which plaintiffs claims a contract was created obligating Maricopa County to pay interest on plaintiffs' bonds until their due dates.

The second of the above statutes, Chapter 1, Title 52, Arizona Revised Statutes of 1913, is the statute which defendants claim modified the provisions of said Chapter 2, Title 52, so as to permit the refunding and calling of bonds issued thereunder by the state loan commissioners whenever such refunding and calling would effect a saving to the county.

The third of the above statutes, Article 4, Chapter 10, Arizona Annotated Code 1939, formerly Article 4, Chapter 60, Arizona Revised Code 1928, together with certain resolutions adopted by defendants, is the statute which plaintiffs contend is the law impairing the obligation of the contract created by the issuance of their bonds.

*Chapter 2, Title 52, Arizona Revised Statutes of
1913*

This statute was first enacted as Chapter 29 of the Acts of Regular Session of the First Legislature of the State of Arizona (Sessions Laws of 1912, Regular Session). Minor additions were made to two sections thereof which are not of significance in this case by Senate Bill 86 and Senate Bill 38 of the Third Session (2nd Special) of the First Legislature (T. 148, 154). With said two additions said act was re-enacted verbatim except that the word "title" was substituted for the word "act" by Chapter 20 of the

Third Special Session of the First Legislature (T. 135, 156). As so re-enacted said act became Chapter 2, Title 52, Arizona Revised Statutes of 1913 and was in full force and effect when plaintiffs' bonds were issued. The title to both the original act and the re-enactment thereof was as follows: "AN ACT—ENABLING COUNTIES, SCHOOL DISTRICTS, CITIES, TOWNS AND OTHER MUNICIPAL CORPORATIONS TO BECOME INDEBTED IN AN AMOUNT EXCEEDING FOUR PER CENT OF THE TAXABLE PROPERTY THEREIN; TO PROVIDE FOR ELECTIONS THEREFOR; TO PERMIT COUNTIES, SCHOOL DISTRICTS, CITIES, TOWNS AND OTHER MUNICIPAL CORPORATIONS TO ISSUE BONDS FOR SUCH INDEBTEDNESS AND TO PROVIDE FOR THE MANNER OF THE EXPENDITURE OF THE PROCEEDS OF SUCH BONDS, THE PAYMENT OF INTEREST THEREON, *AND THE REDEMPTION THEREOF*; TO PROVIDE FOR THE CREATION OF INDEBTEDNESS BY INCORPORATED CITIES OR TOWNS FOR SUPPLYING WATER, ARTIFICIAL LIGHT AND SEWERS WHEN THE WORKS FOR SUCH WATER, ARTIFICIAL LIGHT AND SEWERS ARE OR SHALL BE OWNED OR CONTROLLED BY THE MUNICIPALITY, AND FOR THE REPEAL OF ALL ACTS OR PARTS OF ACTS IN CONFLICT HEREWITH." (Italics ours) (See: Chapter 29, p. 61 Arizona Session Laws of 1912, Regular Session. See also: T. 135, 136).

A certified copy of this act was put in the record by affidavit for the reason that the act is not fully set forth in the Arizona revised statutes of 1913, in

that the title and repealing clause are omitted in said revised statutes.

Section 8 of this act provided that there should be set forth in the order for election, "the aggregate amount of said bonds, *the term thereof*, the rate of interest to be paid thereon, when such interest shall be paid, *the date of maturity* of said bonds or other evidences of indebtedness, and the purpose for which the money derived from the sale of such bonds or other evidences of indebtedness shall be expended" (Italics ours) (T. 143-144).

Section 9 of said act provided that "said bonds shall be payable at a date not to exceed forty years from the date of their issuance." (T. 145) .

Section 10 of said act provided for coupons for the interest to be attached to said bonds (T. 145).

Section 11 of said act provided that said bonds shall not be sold for a less amount than par with accrued interest, such sale to be made after four weeks' publication to the best bidder (T. 145-146).

Section 14 of said act provided for the levy of a tax to pay the principal on said bonds and further provided "The tax in this section provided to be levied shall be levied annually so as to provide a fund for the *redemption of such bonds or other evidences of indebtedness when the same shall mature.*" (Italics ours) (T. 148).

Section 15 of said act provided that "when any bonds or other evidences of indebtedness created un-

der the provisions of this act *shall mature* it shall be the duty of the county treasurer * * * * to give notice for four weeks in some newspaper published in the county * * * * of the intention of said county * * * * to redeem such bonds." (Italics ours) (T. 150).

Plaintiffs' bonds were issued in compliance with the above provisions. Said bonds purport to be issued under said Chapter 2, Title 52, Revised Statutes of Arizona, of 1913 (T. 60, 64). They refer also to Chapter 31 of the Session Laws of Arizona, Regular Session 1917, which was an act creating county highway commissions and providing for the issuance of bonds under the existing statutes of the state for the construction of highways. Further authority for the 1919 issue of bonds involved in this case is found in Chapter 54, of the Session Laws of 1921, ratifying said bonds after the form thereof was determined and a contract for the sale thereof entered into (T. 19-20) and further authority for the 1921 issue of plaintiffs' bonds is found in Chapter 86 of the Arizona Session Laws of 1921, ratifying said bonds after the form thereof had been adopted and placed on record. (T. 28-29).

Chapter 1, Title 52, Arizona Revised Statutes 1913
(See Exhibit F this brief)

This is the statute which the defendants claim modified the provisions of Chapter 2, Title 52, so as to permit the refunding and calling of bonds issued under Chapter 2 by the state loan commissioners whenever such refunding and calling would effect a saving to the county. Plaintiffs' bonds do not mention this statute but purport to be issued under Chapter 2, of

the said Title 52, and Chapter 31 of the Session Laws of 1917 (T. 60, 64). There is, however, in said bonds a general statement that they are issued "pursuant to and in strict compliance with the Constitution of the State of Arizona and the statutes thereof," (T. 60, 64) and the Supreme Court of Arizona reached the conclusion that the provision in Section 5252 of said Chapter 1 to the effect that,

"Said commissioners shall from time to time issue negotiable coupon bonds of this state when the same can be issued at a lower rate of interest than previously paid on state indebtedness and to the profit and benefit of the state,"

was made applicable to county, municipal and school district bonds by the provision in Section 5260 of said chapter to the effect that,

"* * * and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness upon the official demand of said authorities in the same manner as other state indebtedness now allowed or that may be hereafter allowed by law to said county, municipality or school district upon official demand by said authorities,"

and that the combined effect of the two provisions was to give the county board of supervisors the right to require the state loan commissioners to issue refunding bonds for any outstanding county, municipal and school district bonds whether due or not due, including the right to call said bonds at any time when in the opinion of the Board of Supervisors the calling

in of the outstanding bonds and issuance therefor of bonds by the state loan commissioners would effect a saving and benefit to the county.

Maricopa County vs. Osborn, 125 Pac. (2nd) 703.

The greater portion of said Chapter 1, Title 52, had its origin in Chapter 1, Title 31, of Arizona Revised Statutes of 1887, Sections 2039-2052. The particular words in Section 5252 of said Chapter 1, Title 52, which it is claimed authorize the calling of the outstanding bonds first made their appearance in Section 2040 of Chapter 1, Title 31, Revised Statutes of 1887, said words in the 1887 statute being as follows,

“The said commissioners shall from time to time issue negotiable coupon bonds of this Territory when the same can be done at a lower rate of interest and to the profit and benefit of the Territory.”

Said Section 2040, however, authorized redeeming and refunding only of “existing and subsisting Territorial legal indebtedness and also that which may at any time become due.” *It did not authorize redeeming or refunding of any indebtedness before it was due.* Neither did said act of 1887 give the loan commissioners any jurisdiction whatsoever over state, county or municipal indebtedness. Their authority under that act was limited strictly to “territorial indebtedness.” On June 25, 1890, the Congress of the United States which exercised revisory control over the legislation of the territory re-enacted the above mentioned act

of 1887 with certain additions thereto. Chapter 614, 51st Congress, First Session, set forth on pages 103-109 Revised Statutes of Arizona for 1901. (See Exhibit G this brief). One of the additions made by this act of Congress was to extend the power of the loan commissioners to territorial indebtedness that, "may be hereafter authorized by law." Paragraph 2040, page 104, Arizona Revised Statutes 1901. Another addition was by adding a rider to Paragraph 2048 of the Territorial Act of 1887, reading as follows:

"The boards of supervisors of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the territory their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal, and school district indebtedness, upon the official demand of said authorities in the same manner as other territorial indebtedness, and they shall issue bonds for any indebtedness now allowed or that may be hereafter allowed by law to said county, municipality, or school district, upon official demand by said authorities; the county, municipality, or school district to pay into the territorial treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the territorial board of equalization,

or on their failure by the territorial auditor to be levied for the payment of the principal of the bonds issued in redemption, refunding, or other bonds issued to such county, municipality or school district when the same shall become due, and, in addition, a rate of interest paid by the territory on such bonds.”

Paragraph 2048, page 108, Arizona Revised Statutes, 1901.

A further addition to said Territorial Act of 1887, was Section 15 of the Act of Congress, which contained a proviso,

“That the present existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on territorial, county, municipal and school government for the year ending December 31, 1890, may also be funded and bonds issued for the redemption thereof.”

Section 15, page 109, Arizona Revised Statutes, 1901. (See Exhibit G this brief).

It will be noted that the rider added to Section 2048 of the Territorial Act of 1887 by Congress did not empower the loan commissioners to refund county, municipal and school district indebtedness thereafter authorized by law, as it did territorial indebtedness in Section 2040 but with respect to the county, municipal and school district indebtedness it provided the following: (a) The board of supervisors, municipal and school authorities should report their bonded

and outstanding indebtedness, (b) that the commissioners should provide for the redeeming or refunding of the county, municipal and school district indebtedness upon the official demand of said authorities in the same manner as other territorial indebtedness, and (c) that they should issue "bonds for any indebtedness now allowed or that may be hereafter allowed by law to said county, municipality or school district upon official demand by said authorities." The significance of the use of the term, "now allowed," or "that may be hereafter allowed by law," instead of the term, "may be hereafter authorized by law," as was used with reference to territorial indebtedness is made clear by reference to the report of the Congressional Committee upon consideration of the act which is attached to this brief as Exhibit "A". It clearly appears from references to said committee report and to contemporary territorial legislation that the term "allowed by law" had no reference to bonded indebtedness but to the unfunded indebtedness existing and to be incurred before December 31, 1890, the time limit fixed by Section 15 of the act.

On August 3, 1894, Congress passed an act amending Section 15 of the above mentioned Act of June 25, 1890, by providing that outstanding warrants, certificates and other evidences of territorial indebtedness only, issued subsequent to December 31, 1890, up to December 31, 1895, might be included in said refunding bonds. Paragraph 105, page 109, Arizona Revised Statutes of 1901. (See Exhibit H this brief).

On June 6, 1896, Congress passed a further act entitled, "An Act Amending and Extending the Provisions of the Act of Congress Entitled, 'An Act Ap-

proving With Amendments the Funding Act of Arizona, approved June 25, 1890, and the Act Amendatory Thereof and Supplemental Thereto, Approved August 3, 1894,'” (29 Stat. 262). This act is set forth in full in

Gage v. McCord, 5 Ariz. 227, 51 Pac. 977

(See Exhibit “I” this brief). This last act of Congress extended the indebtedness to be refunded under the acts so amended to January 1, 1897.

The foregoing Congressional acts definitely show: (1) that the Act of June 25, 1890, which later became Chapter 1, Title 52, Arizona Revised Statutes of 1913, was limited to the refunding of indebtedness existing when the act was passed except that warrants issued for necessary and current expenses for the year ending December 31, 1890, were authorized to be funded and bonds issued for the redemption thereof, and (2) that said Act of June 25, 1890, limited the refunding to bonds that were due or were surrendered by the holders thereof. The first proposition appears from Section 15 of the Act of June 25, 1890, and the amendment thereof by the Act of August 3, 1894, and the amendment thereof by the Act of June 6, 1896, and also from the report of the committee of the House of Representatives on the Act of June 25, 1890, which is attached to this brief as Exhibit “A”. This report contains the following statement:

“The time within which indebtedness may be funded is placed at December 31, 1890, when the taxes are due and payable. From and after that date there will be cash on hand with which to meet the current expenses of the Territory.”

and from the proceedings of the House of Representatives on the amending act of August 3, 1894, which are set forth in Exhibit "B" attached to this brief. In these proceedings delegate Smith of Arizona, in discussing said act which provides for an extension of the refunding of territorial warrants only, says:

"It is desired to fund them under the Funding Act until the collection of the taxes so as to be able to start on a cash basis. This is purely a local matter extending our Funding Act and the bill is unanimously reported from the Committee on the Judiciary."

Mr. Hunter: "I see that it provides for extending the time up to 1895."

Mr. Smith from Arizona: "Yes. That is until the collection of taxes."

and also from the report of the Committee of the House of Representatives on the Act of June 6, 1896, set forth in Exhibit "C" attached to this brief, in which the Committee says:

"A supplemental Act of Congress was passed and approved August 3, 1894, extending the time for funding outstanding warrants for territorial expenses only until December 31, 1895. The object of the present bill is to further extend the provisions of the Funding Act approved June 25, 1890, until January 1, 1897, so as to permit and authorize the funding of such outstanding indebtedness as might have been funded under the original act had the same been surrendered be-

fore the act had lapsed. It is not proposed to fund any indebtedness which could not have been funded under the original act had said indebtedness been presented in time."

The above statement is repeated in the Report of the Senate Committee on the bill set forth in Exhibit "D" attached to this brief.

It is clear beyond all question that the Act of Congress of June 25, 1890, which later became Chapter 1, Title 52, Arizona Revised Statutes, 1913, as originally adopted, limited the refunding to indebtedness existing when the act was passed with the addition of floating indebtedness incurred before December 31, 1890, the end of the year in which the act was passed, and that by Act of August 3, 1894, there were added to the indebtedness that could be refunded under the act territorial warrants (only) issued up to December 31, 1895, and that by the Act of June 6, 1896, the refunding of all indebtedness authorized by the Act of June 25, 1890, territorial, county, municipal and school district, was extended to January 1, 1897, and this was the last extension.

The second proposition above stated that said Act of June 25, 1890, authorized only the refunding of indebtedness which was due or surrendered by the holder thereof appears conclusively from the proceedings of the House of Representatives on the Act of June 6, 1896, set forth in Exhibit "D" attached to this brief. The report of the Committee on Territories states:

"Only such bonded indebtedness could be funded

as had matured or was voluntarily surrendered by the holders thereof."

Mr. Murphy then the Congressional delegate from Arizona and a former governor of Arizona, stated the following:

"A commission was organized under the act consisting of the governor, the secretary and the territorial auditor, for the purpose of executing the law but, *of course, the outstanding indebtedness bearing a higher rate of interest could not be compelled to be surrendered or funded unless it had matured* and therefore, there still remained a considerable portion which could not be funded. Many obligations were about to mature and they were funded. A portion of the 8% indebtedness was funded but some of the higher interest bearing bonds of counties and municipalities were refused to be surrendered for funding. The expectation was to put the territory upon a cash basis but that expectation was disappointed and the members of the territorial government came here and asked the last Congress to extend the Funding Act for a year longer covering the floating indebtedness and the territorial expense only, but not including the outstanding indebtedness of municipalities bearing a higher rate of interest. That act was passed August 3, 1894." (Italics ours).

The report of the Senate Committee on the same act, Exhibit "C" attached to this brief, also states:

"Only such bonded indebtedness could be funded

as had matured or was voluntarily surrendered by the holders thereof."

Thus it clearly appears that the Act of June 25, 1890, was construed upon its original enactment as not authorizing the very thing which the defendants and the Supreme Court of Arizona now say it did authorize. Needless to say, the defendants did not call to the attention of the Supreme Court of Arizona the above mentioned early construction of said act.

The Act of Congress of June 25, 1890, above mentioned, provided that said act was passed subject to future territorial legislation and the territorial legislature passed an act, approved March 19, 1891, providing for funding territorial, county and other indebtedness, being supplemental to the Act of Congress approved June 25, 1890.

Act 79, page 97, Arizona Session Laws, 1891
Section 1 of said act provided that,

"To carry out the purpose and intention of said act of Congress the loan commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December 1890 of the Territory, the counties, municipalities and school districts within said Territory by the issuance of bonds of said Territory as authorized by said act."

There is nothing whatever in said act of the territorial legislature providing for the funding and payment of indebtedness thereafter to be incurred.

Thereafter, the territorial legislature passed an act approved March 19, 1895, entitled, "An Act to Provide For Funding Territorial Indebtedness Only Incurred Since December 31, 1890, in Accordance With an Act of Congress Entitled, 'An Act Approving With Amendments the Funding Act of Arizona, Approved June 25, 1890,' and approved August 3, 1894."

Act 33, page 42, Arizona Session Laws of 1895.

In this act of the territory, the funding of indebtedness created up to December 31, 1895, was provided for as authorized by the Act of Congress approved August 3, 1894.

It is thus clear that both Congress and the territorial legislature, by subsequent legislation interpreted the provision in the Act of June 25, 1890, as authorizing only the refunding of indebtedness existing when the act was passed.

While no statute was passed thereafter giving the same interpretation, the territorial legislature up until the year 1909 frequently passed acts providing for optional bonds. Inasmuch as such optional bonds would be in direct conflict with the interpretation which the defendants now place on the language used in the Act of Congress of June 25, 1890, these territorial acts clearly show that the legislature of the territory did not interpret said act as it is now interpreted by the defendants. A summary of said territorial acts is attached to this brief as Exhibit "E".

The 1909 legislature was the last territorial legislature. After statehood special acts for the issuance of bonds were prohibited by the state constitution.

The Act of Congress of June 25, 1890, with the amendments that had been made thereto became a law of the state of Arizona insofar as it was not inconsistent with the state constitution by virtue of Section 2 of Article 22 of said constitution, which reads as follows:

“All laws of the Territory of Arizona now in force not repugnant to this constitution shall remain in force as laws of the State of Arizona until they expire by their own limitations or are altered or repealed by law; provided that whenever the word territory meaning the Territory of Arizona appears in said laws the word state shall be substituted.”

Under this provision it is held by the Supreme Court of Arizona that laws of the territory insofar as not inconsistent with the state constitution became laws of the state upon the adoption of the state constitution.

McCarthy vs. City of Tucson, 26 Ariz. 311, 225 Pac. 329.

The first legislature of the state of Arizona at its regular session in 1912 made no changes in said act of congress of June 25, 1890, and at said session enacted no legislation providing for funding or refunding. It did, however, in said regular session in 1912 adopt an act authorizing the issuance of state, county and municipal bonds with the approval of the property taxpayers in excess of 4% of the assessed valuation (Chapter 29, p. 61, Session Laws of 1912, Regular Session. which afterward became Chapter 2, Title

52, Revised Statutes of 1913, under which plaintiffs' bonds were issued). Said legislature at its 1912 regular session also adopted an act providing for the issuance of bonds by school districts when they did not exceed 4% of the assessed valuation of the district (Sections 45 to 54, Chapter 77, p. 364, 368, Session Laws 1912, Reg. Session) which last mentioned act provided that the school trustees should prescribe the form of bonds and must fix the time when the whole or any part of said bonds shall be payable, which should not be more than twenty years from the date thereof and made provision for levying a tax to provide a sinking fund for said bonds and provided that,

“Such tax must not be less than sufficient to pay the interest of said bonds for that year and such portion of the principal as is to become due during such year and in any event must be high enough to raise annually for the first half of the term said bonds have to run a sum sufficient to pay the interest thereon and during the balance of the term high enough to pay such annual interest and pay annually a portion of the principal of said bonds equal to the sum produced by taking the whole amount of said bonds outstanding and dividing it by the number of years said bonds then have to run.”

The provisions of this act have remained practically unchanged to the present time.

At its first special session which was held in 1912, the legislature provided for funding and refunding by re-enacting with some minor changes therein not material to this case, the Act of Congress of June 25,

1890, thus continuing the same in force as the law of the state, (Chapter 29, Sess. Laws 1912, 1st Spec. Sess.).

The fact that in this enactment the legislature copied verbiage plainly obsolete under the new constitution shows that its purpose was primarily to continue the legislative machinery for collecting and disbursing the interest and principal on the bonds already issued rather than to provide for the funding or refunding of existing indebtedness. The fact that no effort was ever made to fund or refund any indebtedness under this statute but when the need for refunding arose in 1927 and 1935 further legislation was passed to provide therefor, substantiates this view.

Amendments were made to two sections of said Chapter 29, Session Laws of 1912, First Special Session, at the second special session of said first legislature (See marginal notations to Chapter 1, Title 52, Revised Statutes 1913) but no action whatever was taken with reference to said act by the third special session of the state legislature (T. 134). Said legislature at its third special session, however, re-enacted in its entirety, with certain amendments, Chapter 29 of the Regular Session of the First Legislature, being an act providing for the issuance of state, county and municipal bonds. This act was Chapter 20, Session Laws of 1913, Third Special Session, and became Chapter 2, Title 52, Revised Statutes of 1913, under which plaintiffs' bonds were issued. This act, including the title, is found on pages 135-156 of the transcript of record.

The transcript of record, pages 157-166, also contains Chapter 64 of the Third Special Session of the First Legislature of the State of Arizona which is not found in the 1913 Revised Statutes. This act directs the code commissioner to compile all laws of a permanent nature in force upon the adjournment of the Third Special Session of the State Legislature or thereafter to take effect but expressly provides that the code commissioner shall have no power to change any law. Said Chapter 64 makes it plain that said Revised Statutes of 1913 are a compilation of existing statutes and not a revised code.

There was in force as a law of the State of Arizona when Chapter 2, Title 52, Revised Code of 1913 was passed, Chapter 19, Third Special Session of the First Legislature, which originally existed as Chapter 5, Title 60, of the Revised Statutes of 1887. It was dropped out of the 1901 Revised Statutes but was revived as Chapter 10, page 8, of the Session Laws of 1907 and became a law of the state upon statehood by virtue of Section 2, Article 22, of the Arizona Constitution. It was re-enacted by the First State Legislature as Chapter 19 of the Third Special Session just prior to the enactment of Chapter 20 of said Third Special Session, afterwards codified as Chapter 2, Title 52, Revised Code of 1913. Section 6 of said Chapter 19 reads as follows:

“Sec. 6. When a statute has been enacted by the legislative power of the state and has become a law no other statute, law or rule is continued in force because it is consistent with provisions of such statute, passed subsequently thereto but

in all cases provided for by such subsequent statute, all statutes, laws and rules theretofore in force in this state, whether consistent or not with the provisions of such subsequent statutes unless expressly continued in force by it, shall be repealed and abrogated."

Section 5553, Revised Statutes of 1913.

This quoted statute is given its full effect by the decisions of the Supreme Court of Arizona.

Olson v. State, 36 Ariz 294, 301; 285 Pac. 282.

DECISIONS CONSTRUING CHAPTER 1, TITLE 52, REVISED STATUTES OF 1913

The Act of Congress of June 25, 1890, and the additional acts pertaining thereto were construed in several cases by the Supreme Court of the United States and the Supreme Court of the Territory of Arizona. Thus it was held that the railroad bonds which were declared void in *Lewis v. Pima County*, 155 U. S. 54, were ratified by the Act of Congress of June 6, 1896, and must be refunded by the loan commissioners.

Utter v. Franklin, 172 U. S. 416, 43 Law Ed. 498, 19 Sup. Ct., Rep. 183.

Murphy v. Utter, 186 U. S. 95, 46 Law Ed. 1070, 22 Sup. Ct., Rep. 776.

Coconino County v. Yavapai County. 5 Ariz. 385, 52 Pac. 1127.

and that the actual refunding operations might be

performed after January 1, 1897, but no indebtedness incurred after that date could be refunded.

Gage v. McCord, 5 Ariz. 227, 51 Pac. 977, 978.
Schuerman v. Territory, 7 Ariz. 62, 60 Pac. 895.

It was also held that the owners of said bonds were entitled to demand this refunding so a demand by the municipal authorities upon the loan commissioners was unnecessary.

Bravin v. Mayor of Tombstone, 6 Ariz. 212, 56 Pac. 719.

Yavapai County v. McCord, 6 Ariz. 423, 59 Pac. 99.

The Supreme Court of Arizona in the second mandamus case, Maricopa County v. Osborn, 136 Pac. (2nd) 270, held that Chapter 1, Title 52, Revised Statutes of 1913, was a re-adoption and a continuation in force of the powers, functions and duties of the loan commissioners as granted by the Congressional Act of June 25, 1890, so that Paragraph 2987, Revised Statutes 1887, which was in force when said Congressional act was passed and became a part of said act by reference remained a part of Chapter 1, Title 52, Revised Statutes of 1913, notwithstanding the fact that it had long since been repealed. The following language of the Supreme Court of Arizona shows its decision to the effect that the re-enactment of the old Congressional Act of 1890 by the First Legislature of the State of Arizona was continuation of that act as the law of the state without change in meaning, to-wit:

“This provision for the publication of notice of the redemption of warrants was in existence simultaneously with the existence of the Funding Act. U. S. Revised Statutes, Paragraph 2046 (see Revised Statutes of Arizona 1901, page 106), which provided also that upon receipt of the purchase price of the bonds issued by the loan commissioners the treasurer should give notice of his readiness to redeem the indebtedness as provided by law as in the case of the payment and redemption of territorial warrants, so when the Special Session of the First Legislature of the State of Arizona re-adopted and continued in force the powers, functions and duties of the loan commissioners as Chapter 29, it effectively continued in force for all purposes insofar as the rights, powers and functions of the loan commissioners are concerned, the provisions of Paragraph 158 of the Revised Statutes of Arizona 1901, fixing the time and method of publication of notice for the redemption of outstanding bonds to be paid from proceeds of the sale of refunding bonds issued by the loan commissioners.”

Paragraph 158, Revised Statutes of Arizona 1901, was originally Paragraph 2987, Revised Statutes of 1887.

REFUNDING STATUTES OF ARIZONA LIMITED TO BONDS THAT ARE DUE OR OPTIONAL

The provisions for refunding county, municipal and school district indebtedness contained in Chapter 1, Title 52, Revised Statutes of 1913 were never attempted to be used. The legislature in 1927, adopted an

act for refunding county, municipal and school district bonds and in said act expressly limited the refunding to indebtedness "which has or may hereafter become payable at the option of such county, school district or municipality," thus indicating a policy of the state at variance with the contention of the defendants in this case.

Chapter 39, page 90, Session Laws Arizona 1927.

In 1935 the legislature passed two acts for refunding state bonds and again expressly limited the refunding to bonded indebtedness "which has or hereafter may become optional for redemption prior to maturity."

Chapter 75, page 304 Session Laws 1935,

Chapter 74, page 299 Session Laws 1935.

Article 4, Chapter 10, Arizona Code Annotated, 1939, originally enacted as Article 4, Chapter 60, Arizona Revised Code 1928.

This is the statute which together with the resolutions of the board of supervisors and state loan commissioners passed in pursuance thereof, is the law that impairs the obligation of the contract created by the issuance of plaintiffs' bonds. While that part thereof which pertains to the refunding of state bonds is substantially a re-enactment of Chapter 1, Title 52, Arizona Revised Statute of 1913, which has been discussed above, it has been definitely settled by several decisions of the Supreme Court of Arizona that it must be construed as a new enactment and as an en-

tirely new measure and not a mere carrying forward of previous legislation. Unlike the Revised Statutes of 1913 which were a mere compilation of previously existing law and the Annotated Statutes of 1939, which were a like compilation, the Revised Statutes of 1928 were enacted as a new and single measure, comprising the entire statutory law of Arizona, of which each section must be considered as of equal validity with any other part of the Code.

Sou. Pacific Co. v. Gila County, 56 Ariz. 499, 503; 109 Pac. (2nd) 610,

Ellery v. State, 42 Ariz. 79, 83; 22 Pac. (2nd) 838,

Hoy v. State, 53 Ariz. 440, 448; 90 Pac. (2nd) 623,

State v. Stewart, 57 Ariz. 82; 111 Pac. (2nd) 70.

In the Southern Pacific Company case, *supra*, the Supreme Court of Arizona said,

“The code of 1928 is not a compiled code as is that of 1939 but is a revised one and we have held all sections of a revised code are entirely new measures and not a mere carrying forward of some previous legislation and dependent for their validity solely upon the action of the legislature at that time and not on previous legislation.”

Furthermore, while said Article 4, Chapter 60, made practically no change in that part of Chapter 1, Title

52, Revised Statutes of 1913, which provides for the refunding of state bonds, that part of said article which relates to the refunding of county, municipal and school district bonds was entirely rewritten with the evident purpose of changing the meaning and effect of the provision. As heretofore stated, the provision relating to refunding of county, municipal and school district bonds in Chapter 1, Title 52, Revised Statutes of 1913, was a part of Section 5260 which had been inserted in a territorial act by an act of Congress in 1890 and had been carried forward without change since that date. In the revision of 1928 this provision was entirely eliminated from Section 2653, which contained the remainder of said Section 5260, and a new Section 2654 was inserted. This new section is devoted exclusively to county, municipal and school district bonds and reads as follows:

“2654—County or municipal bonds by State Loan Commissioners. The boards of supervisors of the counties and the municipal and school authorities, shall report to the state loan commissioners the bonded and outstanding indebtedness of the county, municipality or school district, and, upon the demand of said authorities, the commissioners shall provide for the redeeming or refunding of such indebtedness in the same manner as other state indebtedness, and issue bonds of the state for any indebtedness *allowed by law to be incurred* by such county, municipality or school district. Such bonds shall be issued *upon the faith and credit of the state only to the extent that it will cause to be levied and collected taxes* for the payment of the principal and interest of

such bonds, and pay the same when such bonds have been issued. The county, municipality, or school district shall pay into the state treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the state board of equalization, or on their failure by the state auditor, to be levied for the payment of the principal and interest of such bonds issued for such county, municipality, or school district, in the same manner as is herein provided for the payment of the principal and interest of state indebtedness." (*Italics ours*).

Section 2654 Revised Code 1928.

It will be noted that the provisions of this new section are materially different from the old Congressional rider in Section 5260 Revised Statutes of 1913, which reads as follows:

"The boards of supervisors of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the state their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other state indebtedness, and they shall issue bonds for any indebtedness *now allowed, or that may be*

hereafter allowed by law, to said county, municipality, or school district upon official demand by said authorities. The county, municipality, or school district shall pay into the state treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the state board of equalization, or on their failure by the state auditor, to be levied for the payment of the principal of such bonds issued in redemption, or refunding, or of other bonds issued to such county, municipality, or school district, as herein provided, in the same manner as is herein provided for the payment of the principal and interest of state indebtedness, and, in addition, the interest paid by the state on such bonds.” (Italics ours).

Part of Section 5260, Revised Statutes of Arizona 1913.

It will be noted that the 1928 section permits the refunding of indebtedness “allowed by law to be incurred” instead of merely “indebtedness now allowed or that may be hereafter allowed by law,” to said county, municipality or school district as did the 1913 section, and that the 1928 section provides that “such bonds shall be issued upon the faith and credit of the state only to the extent that it will cause to be levied and collected taxes for the payment of the principal and interest on such bonds and pay the same when such bonds have been issued,” whereas the 1913 section made no provision on this subject but allowed the bonds refunding such county, municipal or school district indebtedness to be governed by the provision for state bonds found in Section 5253 which provided, “* * and the faith and credit of the state is hereby

pledged for the payment of said bonds and the interest accruing thereon as herein provided." This difference was overlooked by the Supreme Court of Arizona in the case of Maricopa County v. Osborn, 125 Pac. (2nd) 703, 707. Under the 1928 act the state does not pledge its faith and credit to the payment of such refunding bonds but under Chapter 1, Title 52, of the Revised Statutes of 1913, such refunding bonds though issued for county, municipal or school district indebtedness were required to be supported by the pledge of the faith and credit of the state and hence were required to be issued as state obligations and were wholly prohibited by Section 5 of Article 9 of the state constitution, prohibiting the state from contracting debts except to supply deficits or failures in revenues or to meet expense not otherwise provided for. In line with the purpose of the new Section 2654, providing for the bonds refunding county, municipal or school district indebtedness to be issued in the name of the state but payable only out of revenues collected from taxes levied in the county, municipality or school district whose indebtedness was refunded instead of making them state obligations as had been the case before the territory became a state, a material change also was made in Section 5259 of the 1913 law which read as follows:

"Providing that all moneys remaining in the interest fund after the payment of the interest and all moneys remaining in the redemption fund after all of said bonds shall have been paid and discharged shall be transferred by the state treasurer to the state general fund,"

This was changed in Section 2652 of the 1928 statute to read as follows:

“Any money remaining in the interest fund after payment of interest and any money remaining in the redemption fund after all of said bonds have been paid and discharged shall be returned by the treasurer to the county, district or municipality whence it came.”

Thus the fund out of which the refunding bonds were to be paid was no longer a state fund as it had been prior to the 1928 change. In addition to being secured by the pledge of the faith and credit of the state under the 1913 act, refunding bonds provided to be issued for state, county and municipal indebtedness were plainly required to be paid, both as to principal and interest, out of the annual tax levy upon the taxable property in the state, as provided by Section 5259 Revised Code 1913. In addition there was a special provision for payment of the interest out of the general fund if the interest fund was insufficient. (Section 5262 Revised Statutes of 1913). These provisions were plainly applicable to bonds issued to refund county, municipal and school district indebtedness as well as to bonds issued to refund state indebtedness under the act for there was nothing whatever in the act to differentiate the bonds issued for refunding county, municipal and school district indebtedness from the bonds issued for refunding state indebtedness and in territorial days the two classes of refunding bonds were issued in the same form as they must necessarily be under the statute as it then stood. After 1928, of course, Section 2654 of the Revised

Code of 1928 excluded refunding bonds issued for county, municipal and school district indebtedness from the obligations and tax levies provided for bonds issued for refunding state indebtedness, also Section 2654 of the 1928 act extended the refunding of county, municipal and school district indebtedness to indebtedness allowed by law to be incurred instead of limiting it to indebtedness existing when the original act was passed but allowed after the passage of the act.

THE RESOLUTIONS OF THE BOARD OF SUPERVISORS AND STATE LOAN COMMISSIONERS

Plaintiffs' bonds were not callable by virtue of any provision of the bonds or the law under which they were issued (T. 17, 27). The county that issued them had no power to call them and pay them off even if it had the necessary money in its treasury to do so but defendants contend that notwithstanding this want of power in the county said bonds were subject to refunding and, therefore, subject to call by action of the state loan commissioners upon demand of the board of supervisors (T. 36-38). This refunding process requires legislative action of the board of supervisors and the state loan commissioners which was supplied by the resolutions of the board of supervisors and the state loan commissioners (T. 50-52, also T. 170-184, T. 186-204 and T. 209, 210). These resolutions purport to be enacted under the authority of Article 4, Chapter 10, Arizona Annotated Code 1939 (T. 174, 176, 177, 181) and the Supreme Court of Arizona has upheld their enactment under said statute.

Maricopa County v. Osborn, 136 Pac. (2nd) 270 (Adv.)

It follows that these resolutions were laws impairing the obligation of the contract created by the issuance of the bonds if that contract did not permit of their being called before their due dates.

ASSIGNMENTS OF ERROR

Assignment Number 1

(Submitted on behalf of both plaintiffs)

The District Court erred in entering summary judgment against the plaintiffs upon the motion of the defendants for the reason that the amended complaint stated a case for declaratory relief within the jurisdiction of the United States District Court, in that it showed an actual controversy between plaintiffs and defendants over the alleged right asserted by the defendants and in process of enforcement by them to call for payment before their maturity dates certain bonds of Maricopa County severally owned by plaintiffs and by such call of said bonds before maturity to violate the contracts of Maricopa County to pay interest on said bonds at the specified rates until their respective maturity dates, which contracts are set forth in said bonds and the coupons attached thereto as directed by resolutions of the board of supervisors adopted in compliance with the then existing statutes of the State of Arizona, and the authority granted by the electors of the county in voting said bonds, and said amended complaint further shows that said call of plaintiffs' bonds is proposed to be made by direction of the Supreme Court of Arizona under and by virtue of Article 4, Chapter 10, of Arizona Annotated Code of 1939, which first became a law of the State

of Arizona by enactment of the Revised Code of 1928, several years after plaintiffs' bonds were issued and under and by virtue of certain resolutions adopted by the Board of Supervisors of Maricopa County and the state loan commissioners of Arizona in pursuance of said Article 4, Chapter 10, Arizona Annotated Code of 1939, and that said Article 4, Chapter 10, Arizona Annotated Code of 1939, originally Article 4, Chapter 60, Arizona Revised Code of 1928, and said resolutions of said board of supervisors and said state loan commissioners, are laws impairing the obligations of the contracts created by the issuance of plaintiffs' bonds. Plaintiffs' amended complaint thus shows that the federal courts have jurisdiction under Section 10 of Article 1, and the Fourteenth Amendment to the Federal Constitution, and it is the duty of said courts to exercise their independent judgment as to whether contracts were created by the issuance of plaintiffs' bonds, what is the meaning and effect of such contracts, and whether they are being impaired by subsequently enacted laws, and that it appears from plaintiffs' amended complaint and the statutes of the State of Arizona under and in pursuance of which plaintiffs' bonds were issued, that contracts were made by Maricopa County under authority granted to it by the state legislature to pay definite rates of interest on both issues of said bonds until the maturity dates specified in said bonds without any reservations to call said bonds and stop the payment of interest thereon before their maturity. Said contracts were expressly authorized by Chapter 2 of Title 52, Revised Statutes of 1913, and Chapter 1 of Title 52, Revised Statutes of 1913, was not applicable to said contracts because,

(a) Said Chapter 1 was originally an Act of Congress, passed in the year 1890, for the refunding of certain territorial indebtedness then existing, and that the authority to fund or refund indebtedness under said act and supplements thereto expired January 1, 1897, and such authority was not revived by the re-enactment of said statute upon statehood;

(b) Said statute did not authorize the refunding of bonds which were not due or redeemable according to their terms without the consent of the holders of such bonds;

(c) Said Act of Congress of 1890 provided for the refunding of county bonds with territorial bonds and, even though re-enacted, upon statehood, by the first legislature of Arizona, was inoperative by reason of Section 5 of Article 9 of the Arizona State Constitution which prohibits the creation of state indebtedness for such purpose;

(d) If said statute had or could have authorized a redemption of county bonds prior to their maturity, such power was repealed by the later enactment of Chapter 2, Title 52, Revised Statutes of 1913, by reason of inconsistent provisions contained in said Chapter 2, as well as by the express provisions of the statutes of Arizona providing that a later statute repeals a prior statute covering the same subject, even though the two statutes are not inconsistent.

(e) The bonds held by plaintiffs contain positive covenants and agreements of Maricopa County to pay interest thereon at the specified rates until their maturity dates and these covenants and agreements

were ratified and approved by the state legislature by Chapters 54 and 86 of Arizona Session Laws 1921, ratifying and approving said bonds after the form of said bonds containing said covenants and agreements had been made a matter of public record, thereby precluding the redemption and call of said bonds in violation of said covenants and agreements.

Plaintiffs' amended complaint further shows that rights guaranteed to them by the Constitution of the United States have been violated and impaired by resolutions of the board of supervisors of Maricopa County and of the state Loan commissioners, enacted under authority of Article 4, Chapter 10, Arizona Annotated Code of 1939. The failure of the District Court to pass upon and decide these federal questions independently of the decisions of the Supreme Court of Arizona rendered in suits to which the plaintiffs were not parties or privies, deprived the plaintiffs of property without due process of law.

The amount involved in this case exceeds the sum of Three Thousand (\$3,000.00) Dollars, as to each plaintiff.

The affidavits filed in support of the motion for summary judgment presented no defense to the amended complaint. The facts show that jurisdiction of the federal courts is properly invoked, that a case is presented for the exercise of independent judgment of the federal courts upon the contracts involved, and the exercise of such independent judgment must necessarily result in granting the relief sought by the plaintiffs.

Assignment Number 2

(Submitted on behalf of plaintiff, State of Washington)

The District Court erred in entering summary judgment against plaintiff, State of Washington, for the reason that the amended complaint stated a case for declaratory relief within the jurisdiction of the United States District Court in that it showed an actual controversy between plaintiff, State of Washington, and defendants, over the alleged right asserted by defendants, and in process of enforcement by them to call for payment before their maturity dates, certain bonds of Maricopa County owned by said plaintiff, and by such call of said bonds before maturity, to violate the contracts of Maricopa county to pay interest on said bonds at the specified rates until their respective maturity dates, which contracts are set forth in said bonds and the coupons attached thereto as directed by resolutions of the board of supervisors adopted in compliance with the then existing statutes of the State of Arizona, and the authority granted by the electors of the county in voting said bonds, and plaintiff, State of Washington, as a sovereign state, by virtue of Section 2 of Article III of the Constitution of the United States, is entitled to have the controversy between it and the defendants which is alleged in the amended complaint, determined by the independent judgment of the Federal Courts on the basis of equity and fair dealing between sovereign states, rather than by the decision of the Supreme Court of the State of Arizona in the mandamus suits in which plaintiff, State of Washington, had no opportunity to be heard. That

the consideration due from the Federal Courts to sovereign states applies in cases arising in the district court as well as original suits in the United States Supreme Court; that it was the duty of the United States District Court and is the duty of the Circuit Court of Appeals to exercise an independent judgment as to whether contracts were created by the issuance of plaintiffs' bonds, what are the meaning and effect of said contracts, and whether they are being impaired by subsequently enacted laws and that it appears from plaintiffs' amended complaint and the statutes of the State of Arizona under and in pursuance of which plaintiffs' bonds were issued that contracts were made by Maricopa County under authority granted to it by the state legislature to pay definite rates of interest on both issues of said bonds until the maturity dates specified in said bonds without any reservation to call said bonds and stop the payment of interest thereon before their maturity. Said contracts were expressly authorized by Chapter 2, of Title 52, Revised Statutes of 1913, and Chapter 1, of Title 52, Revised Statutes of 1913, was not applicable to said contracts because,

(a) Said Chapter 1 was originally an act of Congress passed in the year 1890, for the refunding of certain territorial indebtedness then existing and that the authority to fund or refund indebtedness under said act and supplements thereto expired January 1, 1897, and such authority was not revived by the re-enactment of said statute upon statehood;

(b) That said statute did not authorize the refunding of bonds which were not due or redeemable according to their terms without the consent of the holders of such bonds;

(c) That said Act of Congress of 1890 provided for the refunding of county bonds with territorial bonds and, even though re-enacted, upon statehood, by the first legislature of Arizona, was inoperative by reason of Section 5 of Article 9 of the Arizona State Constitution, which prohibits the creation of state indebtedness for such purpose;

(d) That if said statute had or could have authorized a redemption of county bonds, prior to their maturity, such power was repealed by the later enactment of Chapter 2, Title 52, Revised Statutes of 1913, by reason of inconsistent provisions contained in said Chapter 2, as well as by the express provisions of the Statutes of Arizona providing that a later statute repeals a prior statute covering the same subject, even though the two statutes are not inconsistent.

(e) The bonds held by plaintiffs contain positive covenants and agreements of Maricopa County to pay interest thereon at the specified rates until their maturity dates and these covenants and agreements were ratified and approved by the state legislature by Chapters 54 and 86 of Arizona Session Laws of 1821, ratifying and approving such bonds after the form of said bonds containing said covenants and agreements had been made a matter of public record thereby precluding the redemption and call of said bonds in violation of said covenants and agreements.

Plaintiffs' amended complaint further shows that rights guaranteed them by the Constitution of the United States have been violated and impaired by resolutions of the board of supervisors of Maricopa

County and of the state loan commissioners, enacted under authority of Article 4, Chapter 10, Arizona Annotated Code of 1939. That failure of the District Court to pass upon and decide these federal questions, independently of the decisions of the Supreme Court of Arizona rendered in suits to which the plaintiffs were not parties or privies, deprived the plaintiffs of property without due process of law.

The amount involved in this case exceeds the sum of Three Thousand (\$3,000.00) Dollars, as to each plaintiff.

The affidavits filed in support of the motion for summary judgment presented no defense to the amended complaint. The facts show that jurisdiction of the Federal Courts is properly invoked, that a case is presented for the exercise of independent judgment of the Federal Court upon the contracts involved, and the exercise of such independent judgment must necessarily result in granting the relief sought by plaintiffs.

ARGUMENT

Preliminary

Assignment No. 1 is applicable to both plaintiffs. Assignment No. 2 is applicable to plaintiff, State of Washington. The following argument is applicable to Assignment No. 1, except where reference is made to Assignment No. 2.

Two primary questions are presented for decision.

1. *Have the federal courts jurisdiction to exercise*

their independent judgment on the merits of this case under the decision of the Supreme Court in Erie R. Co. vs. Tompkins notwithstanding the opinions of the state Supreme Court in the two mandamus cases?

2. *What is the true interpretation of the contracts created by the issuance of plaintiffs' bonds?*

The first question is divided into two parts, viz. what is the jurisdiction of the federal courts on the facts alleged in the amended complaint (a) in the case of an ordinary plaintiff and (b) where plaintiff is a sovereign states?

I

The federal courts have jurisdiction and are required to exercise their independent judgment on the merits of this case notwithstanding the opinions of the State Supreme Court in the two mandamus suits:

1. The amended complaint presents a case of impairment of the obligation of contracts by subsequently enacted legislation.

a. The amended complaint formally invokes federal jurisdiction upon the ground that the case arises under the Constitution and laws of the United States (T. 4).

b. The amended complaint alleges the creation of contracts by the issuance of plaintiffs' bonds (T. 7-30).

These contracts are based upon the statutes

existing when the bonds were issued, the proceedings taken in pursuance of said statutes and in addition thereto the ratification of the bonds in the form in which they were issued by the legislature of the state (T. 19, 28).

c. It appears that the parties are agreed that contracts were created by the issuance of the bonds but differ as to the meaning and effect of those contracts, plaintiffs alleging that said bonds were to run for definite terms (T. 11-12, 21-22) and that there was no provision whatever for calling them before their maturity dates (T. 17, 27) and that plaintiffs paid large premiums for the right to collect interest thereon at the specified rates until their maturity dates (T. 20-21, 29-30). Defendants assert that a right to redeem and refund said bonds was given at the time of their issuance by the provisions of Chapter 1, Title 52, Sections 5251-5265 of Revised Statutes of 1913 and, hence, the contracts created by their issuance made them subject to refunding and calling in the manner proposed (T. 38-40) and in this position defendants are sustained by the decisions of the Supreme Court of Arizona in the cases of Maricopa County v. Osborn, 125 Pac. (2nd) 703 and Maricopa County v. Osborn, 136 Pac. (2nd) 270 (adv.) It thus appears that the controversy involves principally the interpretation of the contracts created by the issuance of the bonds which does not present a question of federal jurisdiction but a question of the merits to be independently determined by the federal courts in the exercise of the jurisdiction conferred

upon them by the federal constitution and statutes.

d. The amended complaint alleges that plaintiffs' contract rights to collect the interest on their bonds are threatened to be destroyed by proceedings now pending which are being taken under statutes of the state and resolutions of the board of supervisors and state loan commissioners enacted subsequently to the issuance of plaintiffs' bonds (T. 30-34). Said proceedings have been upheld by the Supreme Court of Arizona.

Maricopa County v. Osborn, 136 Pac. (2nd) 270 (adv.)

e. It appears that the subsequently enacted statute and resolutions which plaintiffs claim to be the laws impairing their contracts, are

(1) Article 4 Chapter 10 Arizona Code Annotated 1939 and

(2) Resolutions of the board of supervisors and state loan commissioners (T. 170, 172, 196, 197, 199, 202, 209). Said resolutions were adopted pursuant to said Article 4, Chapter 10, Arizona Annotated Code 1939 (T. 176, 177, 179).

(1) The amended complaint alleges that Article 4, Chapter 10, Arizona Annotated Code was originally enacted as a new statute by its inclusion in the Arizona Revised Code of 1928 (T. 36). That said Article 4, Chapter 10, was such a new enactment cannot be successfully denied (see

pages 36-43 of this brief). The changes made in the former Chapter 1, Title 52, Revised Statutes of 1913 are material and the nature of the changes are convincing that the purpose thereof was to make an effective statute of what had been waste statutory verbiage since 1897. Even if said Chapter 1, Title 52, had been incorporated into the 1928 Revised Code without change in wording such incorporation would have materially changed its meaning and made a new statute of it. As it existed in the 1913 Revised Statutes it was part of a compilation of statutes. It was an older statute than Chapter 2, Title 52, (see pages 31-33 of this brief) and any of its provisions that were inconsistent with said Chapter 2 were undoubtedly repealed. The Supreme Court of Arizona has declared that, "It is the universal rule of statutory construction that when a subsequent act of the legislature is in conflict with a prior act it by implication repeals so much of the prior act as is in conflict with the latter law."

City of Bisbee v. Cochise County, 44 Ariz. 233, 241, 36 Pac. (2nd) 559,

Biles v. Robey, 43 Ariz. 276, 281, 30 Pac. (2nd) 841,

Irvine v. Frohmiller, 58 Ariz. 391, 397, 120 Pac. (2nd) 404,

State Board of Health v. Frohmiller, 42 Ariz. 231, 235, 23 Pac. (2nd) 941,

State v. Angle, 54 Ariz. 13, 20, 91 Pac. (2nd)
705

See also:

59 Corpus Juris, Sec. 514, p. 910,

25 Ruling Case Law, Sec. 167, p. 914.

So, under the 1913 Revised Statutes the contention that a provision of Chapter 1, Title 52, modified a provision of Chapter 2 of said title could not be reasonably made, but after the incorporation of said two chapters in the Revised Code of 1928, it could be reasonably argued that since the two chapters were now on an equality and must be construed together and harmonized (see page 37 of this brief), the provisions of Chapter 2, providing for definite maturity dates must be held to yield to the provisions of Chapter 1, authorizing refunding of all bonds.

The argument just made is strengthened by Section 6 of Chapter 10, Session laws of 1907 re-enacted by Chapter 19, of the Third Special Session of the First Legislature (Sec. 5553 R.S. of 1913) which unquestionably had the effect of causing Chapter 2, Title 52, to repeal Chapter 1 of said title, not only as to all provisions inconsistent with said Chapter 2, but as to all provisions covering the same subject matter. Under said Section 6, the provision in Chapter 2, providing for redeeming bonds after maturity, certainly repealed any provision in Chapter 1 alleged to provide for redeeming the same bonds

both before and after maturity, (see pages 32 and 33 of this brief) but if both chapters had gone unchanged into the 1928 Revised Code (which they did not) it might be argued that they were thereafter on an equality and that to harmonize them Chapter 1 might be given the effect of modifying Chapter 2 (see page 36 of this brief).

We think the considerations we have just set forth irrefutably demonstrate that Article 4, Chapter 10, Arizona Annotated Code 1939, formerly Article 4, Chapter 60, Revised Code of 1913, was enacted as a new statute in 1928, becoming effective July 1, 1929.

(2) While we believe we have demonstrated above that the act of the legislature under which defendants claim the right to call plaintiffs' bonds was enacted subsequent to the issuance of the bonds, such demonstration is not necessary to provide a federal question in this case. The resolutions of the board of supervisors and state loan commissioners are in themselves laws impairing the obligations of the contracts created by the issuance of plaintiffs' bonds (see pages 43-44 of this brief). Plaintiffs are the holders of valid bonds and coupons and their right to collect the same is undisputed. Defendants' contention is that the board of supervisors may take official action requiring the state loan commissioners to refund plaintiffs' bonds by issuing state refunding bonds to take the place of plaintiffs' bonds, such refunding bonds of the state to be payable

by the state out of tax levies imposed upon the county. To this power of the Board of Supervisors and state loan commissioners to issue these state refunding bonds, the power to call plaintiffs' bonds is claimed to be incidental. It is plain that without the issuance of these state refunding bonds no power exists to call plaintiffs' bonds. The issuance of such bonds is the exercise of the power of legislation.

State v. Osborn, 51 Pac. 837 (Nev.),

Board of Commissioners v. Aetna Life Ins. Co.,
90 Fed. 222,

Keigley v. Bench, 89 Pac. (2nd) 480, (Utah),

People v. Graham, 230 Pac. 277 (Colo.)

Abbott Public Securities Sec. 434, 443 pp. 859,
873.

Since calling plaintiffs' bonds requires the exercise of legislative power, it is clear that the resolutions necessary for the purpose are legislative acts or laws within the meaning of the impairment of obligation of contract provision. Examination of the proceedings adopted by defendants (T. 167,217, 114-127) serves to show what is necessary to accomplish the refunding and that somewhat elaborate legislation is necessary.

Boards of Supervisors are the legislative bodies of counties.

Sec. 17-309 Arizona Code Annotated, 1939.

Resolutions of municipal corporations are often held to be laws impairing the obligation of contracts within the meaning of Section 10, Article 1, of the United States Constitution.

Northern Pac. R.R. Co. v. Duluth, 208 U. S. 583, 590, 52 Law ed 630, 28 Supt. Ct. Rep. 341.

Mercantile Trust Co. v. Columbus, 203 U. S. 311, 320, 51 Law ed. 198, 27 Sup. Ct. Rep. 83,

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 10, 43 Law ed. 341, 19 Sup. Ct. Rep. 77,

Murray v. Charleston, 96 U. S. 432, 443, 24 Law ed. 760.

So also are actions of railroad commissions and other subordinate bodies.

Grand Trunk R.R. Co. v. Indiana R.R. Commission, 221 U. S. 400, 403, 55 Law ed. 786, 31 Sup. Ct. Rep. 537,

Lake Erie and Western R. Co. v. Public Utility Commission, 249 U. S. 422, 63 Law ed. 684, 39 Sup. Ct. Rep. 345.

See also:

Atlantic Coast R.R. Co. vs. Goldsboro, 232 U. S. 548, 555, 58 Law ed. 721, 34 Supt. Ct. Rep. 364,

Williams v. Bruffy, 96 U. S. 176, 183, 24 Law ed. 716.

2. The decision of the state Supreme Court in the two mandamus cases does not oust the jurisdiction of the Federal Courts.

a. In a suit where the jurisdiction is based upon the charge that a contract is being impaired by a law of the state, the federal courts while giving due weight to the decision of the state courts must make independent determination according to their own judgment whether a contract exists, what are its terms, and whether it is being impaired by a law of the state.

Appleby v. New York, 70 L. ed. 992, 999, 271 U. S. 364, 46 Sup. Ct. Rep. 569,

Davis v. Wechsler, 68 L. ed. 143, 145, 263 U. S. 22, 44 Sup. Ct. Rep. 13.

In the *Appleby* case, *supra*, Chief Justice Taft states the rule as follows:

“The plaintiffs in their writ of error charge that the judgment of the supreme court of New York as affirmed by the court of appeals has interpreted and enforced the Acts of 1857 and 1871, in such a way as to impair the obligation of the contract in their deeds.

“The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the state

court? These questions we must answer independently of the conclusion of that court. Of course, we should give all proper weight to its judgment, but we cannot perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depends chiefly upon the extent of the power of the state and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the state, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the state court then and since made; *but we must give our own judgment derived from such sources and not accept the present conclusion of the state court without inquiry.*" (Italics ours).

and in the Davis case, *supra*, Mr. Justice Holmes states the following:

"We are of the opinion that the judgment

must be reversed. Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. Even if the order went only to the venue, and not to the jurisdiction of the court, each Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed, when the law requires him to unite his defense on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. *The state courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of Federal right.* The principle is general and necessary. *Ward v. Love County*, 253 U. S. 17, 22, 64 L. ed. 751, 758, 40 Sup. Ct. Rep. 419. If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill v. Grand Lodge, K*, (25) P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822.

This is familiar as to the substantive law, and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. See *American R. Exp. Co. v. Levee*, decided this day (263 U. S. 19, ante, 140, 44 Sup. Ct. Rep. 11)." (Italics ours).

b. The Supreme Court has pointed out that in determining whether a contract is in fact being impaired, it is not limited to the particular language of the state court, but must look at the whole situation to determine for itself whether a contract is actually being impaired.

La. R.R. and Navigation Co. v. New Orleans, 235 U. S. 164, 170, 59 Law ed. 175, 35 Sup. Ct. Rep. 62.

c. The decision of the state court as to the interpretation and effect of the law which it is charged impairs the obligation of a contract, will be accepted, but a decision of the state court as to whether there was a contract and what were its terms, and as to whether it has been impaired, are federal questions which the federal courts must determine independently.

Northern Central R.R. Co. v. Maryland, 187 U. S. 258, 266, 47 Law ed. 167, 23 Sup. Ct. Rep. 62,

Cone v. Rorick, 112 Fed. (2) 894, 897.

In the *Northern Central Railroad Case*, *supra*, the court says the following:

“Where a contract is claimed to arise from a state law and it is held below that a subsequent statute has repealed the alleged contract and effect is thereby given to the subsequent law, the mere question whether the alleged contract has been repealed by the subsequent law is a state and not a federal question. In such a case this court concerns itself not with the question whether the state law, from which the contract is asserted to have arisen, has been repealed, but proceeds to determine whether the repeal was void because it produced an impairment of the obligations of the contract within the purview of the Constitution of the United States. In other words, where the state court has given effect to a subsequent law, this court decides whether such effect, so given by the state court, violates the Constitution of the United States.”

d. When the decision of the state Supreme Court has the effect of putting a subsequently adopted state statute or municipal ordinance or resolution into effect the fact that this result is arrived at by the state court, holding that the alleged contract does not exist or does not have the effect claimed, does not exclude the jurisdiction of the federal courts. In such cases the federal courts have jurisdiction and must independently determine the true meaning and effect of the alleged contract.

In the lower court defendants contended that

since the state Supreme Court in the mandamus cases had put its decision upon the ground that the contract created by plaintiffs' bonds permitted the redemption thereof in the manner proposed, no question of impairment of contract was presented. The contention is unsound. The object of both of the mandamus suits was to enforce the subsequent statute and the resolutions adopted thereunder (see petition for writ of mandamus T. 167-218). The judgments of the state Supreme Court ordered defendants' resolutions adopted in pursuance of Article 4, Chapter 10, the subsequent law to be put into operation.

Maricopa County v. Osborn, 125 Pac. (2nd) 703,

Maricopa County v. Osborn, 136 Pac. (2nd) 270 (adv.)

It is thus a clear case of where the decision of the state Supreme Court gives effect to the subsequent law but in doing so declares that plaintiff had no such contract as he asserts. The opinion of the state Supreme Court on this question of the meaning of the contract is not binding upon the federal courts. Numerous cases among which are the following so hold:

In the case of

University v. People, 99 U. S. 309, 320, 25 Law ed. 387

the State of Illinois under the constitution of 1848, by a statute enacted by the legislature in

1855, had granted exemption from taxation to the property of Northwestern University. The constitution of 1870 contained a provision limiting the exemption from taxation to such property as was used for school, religious, etc. purposes. Prior to the adoption of this language in the constitution, all of the property owned by the university had been exempted from taxation. After the adoption of said constitution under a statute enacted in 1872 it was attempted to tax property of the university not being used for school or religious purposes but which was leased by the university to others. The Supreme Court of Illinois held that the Statute of 1855 properly construed with reference to the state Constitution of 1848, limited the exemption to property used for school and religious purposes. On writ of error to the Supreme Court of the United States it was contended that no federal question was involved for the reason that the only question presented was the decision of a court construing a contract or a statute and that no law of the state impaired the obligation of the contract as so construed. The Supreme Court of the United States rejected this contention and held that the taxing officers were proceeding to assess the university's lands for taxation under the Constitution of 1870 and the law of 1872, and that since by this subsequent constitution and law plaintiff's alleged rights were being violated, a question was presented for the determination by the federal courts as to whether those rights were as claimed and whether the contract admitted by both parties to exist in some form, constituted an exemption of all the

university's property, or only that part of it which was used for school and religious purposes. On the merits said court held that the construction of the statute by the Supreme Court of Illinois was erroneous, that the contract of exemption extended to all property owned by the university and, hence, the Act of 1872 impaired the obligation of the university's contract.

This same principle has been frequently applied.

In the case of

Louisiana R.R. and Navigation Co. v. New Orleans, 235 U. S. 164, 170, 59 Law ed. 175, 35 Sup. Ct. Rep. 62

the railroad company claimed certain rights under a contract from the city of New Orleans. The city brought suit under subsequently enacted ordinances to restrain the railway company from proceeding under the earlier ordinance of the city, claiming that the contract provided for by the earlier ordinance contained a suspensive condition and that this condition had been impossible of realization and the contract had of consequence fallen through. The railway company defended upon the ground that the subsequent ordinance adopted by the city violated the railway company's contract. The Supreme Court of the state rendered judgment for the city. On writ of error the city moved to dismiss upon the ground that the state court gave no effect to the subsequent ordinance but based its decision upon

the ground that the alleged contract no longer existed. The Supreme Court of the United States rejected this contention, saying:

“It is equally well settled that where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made or that it was invalid, or that it has become inoperative. In such a case this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and expression to the subsequent law and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee (citing authorities) and in determining whether effect has been given to the later statute this court is not limited to the mere consideration of the language of the opinion of the state court (citing authorities).

In the case of

Detroit United Ry Co. v. Michigan, 242 U. S. 238, 247, 61 Law ed. 268, 37 Sup. Ct. Rep. 87

the City of Detroit granted a franchise to a street railway company. Other franchises were grant-

ed to other companies in suburban territory. These were all acquired by the Detroit United Railway. The suburban territory was annexed to the city. The original city franchise fixed lower rates than those granted in the suburban territory. After the suburban territory was annexed to the city, it was contended by the city that the annexation statutes had the effect of making the original rates applicable to all the territory, while the railway company claimed the right to charge the higher rates in the suburban territory permitted by the franchises granted for that territory before the annexation. Certain suits brought by the city to compel the acceptance of the city's contention were sustained by the Supreme Court of the state. In the Supreme Court of the United States, on writ of error, it was contended by the city that the judgments of the Supreme Court of the state were based solely upon the meaning that it attributed to the original ordinances without reference to any subsequent legislation; that hence no federal question was presented. The court rejected the contention in the following language:

“It is true, as this court has many times decided, that the ‘contract clause’ of the Constitution is not addressed to such impairment of contract obligations, if any, as may arise by mere judicial decisions in the state courts without action by the legislative authority of the state. *Cross Lake Shooting and Fishing Club v. Louisiana*, 224 U. S. 632, 639; *Frank v. Mangum*, 237 U. S. 309, 344.

“But in this case there were state laws passed subsequent to the making of the alleged contracts in question, in the form of the legislation of 1905 and 1907 extending the corporate limits of the city. And it is not correct to say that the decisions of the state court turned upon the mere meaning of the contracts without reference to these subsequent laws. Assuming what in effect is conceded, that the village and township franchises constituted contracts within the protection of the Federal Constitution, the force of the decisions was to abrogate the rights acquired by plaintiff in error through its acquisition of the suburban lines, not merely because of the assent of the owners of the city lines to the ordinances of January 3, 1889, but because of the combined effect of those ordinances and the acts of the legislature of Michigan that thereafter extended the city limits. It is true that no question is or can be here made respecting the authority of the legislature to add new territory to the city; and it is likewise true that the annexation acts contain no reference to existing contracts, nor any specific mention of the subject-matter of street railway rights. But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the deci-

sion is reached, or the precise extent to which reliance is placed upon the subsequent legislation. *McCullough v. Virginia*, 172 U. S. 102, 116, 117; *Houston & Texas Central R. R. Co. v. Texas*, 177 U. S. 66, 77; *Terre Haute & C. R. R. Co. v. Indiana* 194 U. S. 579, 589; *Hubert v. New Orleans*, 215 U. S. 170, 175; *Fisher v. New Orleans*, 218 U. S. 438, 440; *Carondelet Canal Co. v. Louisiana*, 233 U. S. 362, 376; *Louisiana Ry. & Nav. Co. v. New Orleans* 235 U. S. 164, 170. The necessary operation of the decisions under review is to give an effect to the annexation acts that substantially impairs the alleged contract rights of plaintiff in error as they theretofore stood; and it makes no difference that that result was reached in part by invoking the provisions of another agreement supposed to be binding upon plaintiff in error. Whether the agreement thus invoked, when properly construed, has the effect attributed to it, is a question that touches upon the merits, and not upon the jurisdiction of this court."

In

McCullough v. Va., 172 U. S. 102, 116, 43
Law ed. 382, 19 Sup. Ct. Rep. 134

the State of Virginia in 1871 passed an act for refunding the public debt and provided that the coupons attached to refunding bonds should be receivable after their maturity for payment of taxes. The provision proved burdensome to the

state which thereafter sought by various acts of legislation to destroy or limit the use of the coupons to pay the taxes. The Supreme Court of Virginia held that the act of 1871 granting the privilege was void. On writ of error to the Supreme Court of the United States it was contended that since the court of appeals of Virginia did not consider the subsequent legislation passed by the state in connection with the contract created in 1871, but limited itself to a consideration of the act of 1871 and adjudged it void, no federal question was involved. The court rejects the contention saying the following:

“It is true the court of appeals in its opinion only incidentally refers to statutes as subsequent to the act of 1871 and bases its decision distinctly upon the ground that this act was void so far as it relates to the coupon contract but at the same time it is equally clear that the judgment did give effect to the subsequent statutes and it has been repeatedly held by this court that in reviewing the judgments of the courts of a state we are not limited to a mere consideration of the language used in the opinion but may examine and determine what is the real substance and effect of the decision.”

In *Houston and Central R. R. Co. v. Texas*, 177 U. S. 66, 77, 44 Law ed. 673, 20 Sup. Ct. Rep. 545

the State of Texas sued the railroad company to recover the amount due on certain bonds issued

by the railroad company to the state. The state had passed a statute after the issuance of the bonds permitting payment of interest on the bonds in state treasury warrants or state bonds and later passed another statute that such treasury warrants or state bonds should be received only from the railroad companies who received them at par for freight or passage at the prices or rates established by law. The railroad company acquired treasury warrants in reliance on these statutes. After the passage of another act in 1870 payments made by such warrants were stricken out and further payments demanded from the railroad company upon the basis that the acts under which these warrants had been received were invalid. The state court held that the original acts were void as in violation of the state constitution and on writ of error to the Supreme Court of the United States the contention was made that there was no federal question for the reason that the decision of the State Supreme Court involved merely the validity of the original legislation. The contention was rejected by the Supreme Court in the following language:

“Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the state constitution, and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the act of 1870

yet the necessary consequence of the judgment was that effect was thereby given to that act, and in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The company has never accepted such a construction, but on the contrary has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below."

In the case of

Bridge Proprietors v. Hoboken County, 1 Wallace, 116, 144, 17 Law ed. 571

the plaintiffs were granted a right to construct a toll bridge under the Act of 1790, which prohibited the erection of any other bridges across the same river within certain limits. By the act of 1860 the New Jersey legislature granted a right to build a railroad bridge to the defendants, inside of the limits prohibited by the Act of 1790. The plaintiffs brought suit to enjoin the erection of the bridge by the defendants. The state court dismissed the bill on the pleadings. In the Supreme Court of the United States on writ of error it was contended that no federal question was involved. The court says:

“But there is a misconception as to what was construed in this case by the State court. It is very obvious that the statute of 1860 was not construed. No doubt is entertained by this court, none could have been entertained by the state court, that it was intended by the framers of that act to authorize the defendants to build the railroad bridge which they were building, and which plaintiffs sought to enjoin. The act which was really the subject of construction was the act of 1790, under which plaintiffs claim. For if that act and the proceedings under it amount to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860 then the latter act must be void as impairing that contract. If on the other hand the first act and the agreement under it was not a contract, or if being a contract it did not prohibit the erection of such a structure as that authorized by the act of 1860, the latter act was valid, because it did not impair the obligation of a contract. It was then the act of 1790 which required construction, and not that of 1860 in order to determine whether the latter was valid or invalid.

“In the case of the Jefferson Branch Bank v. Skelly,* this court says: ‘Of what use would the appellate power of this court be to the litigant who feels himself aggrieved by some particular state legislation, if this court

could not decide independently of all adjudication by the Supreme Court of a State, whether or not the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by the Supreme Court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could, with fidelity to the Constitution of the United States, following the Supreme Court of a State in such matters, when it entertains a different opinion.'

*1 Black 436''

In the case of

Carondelet Canal Co. v. Louisiana, 233 U. S. 362, 376, 58 Law ed. 1001, 34 Sup. Ct. Rep. 627

the State of Louisiana brought a suit to recover certain property from the canal company. The state's claim was based upon legislative acts which vested the property in the canal company with power in the state to take possession of the canal and its appurtenant property upon termination of the company's existence. The act of 1906 appointed a board of control to take possession of the property. The Supreme Court of the state decided in favor of the state. On writ of error to the Supreme Court of the United States on motion to dismiss by the state the Supreme Court of the United States said:

“The State, as we have said, made a motion to dismiss on two grounds, one of which we have decided; the other is that no Federal question is presented by the record, the canal company failing to distinguish, it is contended, between a subsequent act of the legislature impairing the contract and the decision of the court construing it. The question then is whether the act of 1906, appointing the board of control and investing it with powers, was an act which impaired the obligation of the contract, and in the solution of the question we must assume that the act of 1858 constituted a contract between the State and the canal company. The negative of the question is urged by the Attorney General in an argument of strength in which he contends the court did not consider or give any effect to the act of 1906 but considered only the act of 1858 and decided that the canal company did not acquire the rights under it which the company contends for. In other words, decided that the act of 1858 gave no rights which the State did not already have and which it was entitled to possess upon the expiration of the charter of the canal company. There is, as we have said, strength in the contention, but, of course, the fact that the Supreme Court did not refer to the act of 1906 does not put it aside from consideration. If it was the assertion of legislative power against the contract of the company and a legislative provision against the obligation of the contract, and

was an essential, although unmentioned, element of the decision under review, it is a basis for the Federal question set up. Nor need bad motives be imputed to the legislature. It is not the motive which caused the enactment of the law which is of account, but the effect of the enactment, impairing the rights resting in the contract. And this, we think, was the effect of the act of 1906. It was treated as an important factor in the State's petition in both the charging part and the prayer. The Board of Control had something else to do besides to wait. It was an agency of invasion and it was by its especial command that the Attorney General made demand upon the company."

In

Murray v. Charleston, 96 U. S. 432, 433, 24
Law ed. 760

the City of Charleston sold certain stock which was in legal effect an ordinary money bond on which it agreed to pay a certain rate of interest. Thereafter it passed certain taxing ordinances by which it imposed a tax on said stock and provided that the amount of such tax should be withheld from the payment of interest on the stock. On suit brought by the stockholder or bondholder to recover the difference in interest, the Supreme Court of South Carolina held the withholding of the tax was valid. On writ of error the Supreme Court of the United States says:

“That involved in the judgment of the Court of Common Pleas and in that of the Supreme Court of the State was a decision that the city ordinances of Charleston were valid, that they did control the contract of the city with the plaintiff, and that they did not impair its obligation,. is too plain for argument. The plaintiff complains that the city has not fully performed its contracts according to their terms, that it has paid only four per cent interest instead of six per cent, which it promised to pay, and that it has retained two per cent of the interest for its own use. The city admits all this, but attempts to justify its retention of one-third of what it promised to pay by pleading its own ordinances directing its officer to withhold the two per cent of the interest promised whenever it became due and payable according to the stipulations of the contract, calling the amount detained a tax. Of course, the question is directly presented whether the ordinances are a justification; whether they can and do relieve the debtor from full compliance with the promise; in other words, whether the ordinances are valid and may lawfully be applied to the contract. The court gave judgment for the defendant, which would have been impossible had it not been held that they have the force of law, notwithstanding the Constitution of the United States, and the Supreme Court affirmed the judgment. Our jurisdiction,. therefore, is manifest.”

We call the attention of the court particularly to the two cases last above cited. In the case of Carondelet Canal Company v. Louisiana the court points out that the canal company was in possession of the property and the board of control under the subsequent state statute assumed the initiative to take away from the canal company the rights that it claimed under its alleged contract. In the language of the court, "The board of control had something else to do besides to wait. It was an agency of invasion." So in our case the plaintiffs have their bonds and coupons according to the terms of which Maricopa County is obligated to pay them their interest until the maturity dates of the bonds but by the resolutions of the board of supervisors and the state loan commissioners adopted in pursance of the subsequent act of the legislature the defendants with aid from the state Supreme Court are proceeding to publish notice to deprive the plaintiffs of the right to their interest. Thus, in the language of the Supreme Court of the United States they have become "an agency of invasion." In others words, it is not a case merely of a decision of the courts of the state depriving the plaintiffs of rights they thought they had as was the situation in those cases where the courts of the state merely construed the contract against the holder thereof, but it is a case where without a subsequent legislative act the plaintiffs would continue to enjoy the full rights which they claim without question. The resolutions of the board of supervisors and state loan commissioners are the agency by which plaintiffs' contract is being impaired. In other

words, these resolutions are the state's weapons by which the rights plaintiffs claim are being stricken down and to say that it is not these resolutions but the decision of the Supreme Court of Arizona that impairs the obligation of plaintiffs' contracts is not true. The decisions of the Supreme Court of Arizona merely give permission to defendants to use their weapons, the resolutions, to attack plaintiffs' rights.

In the case of *Murray v. Charleston*, the last case above cited, the situation was almost identical to what it is in our case. There the bondholder had his stock or bond which gave him the right to collect the 6% interest. The city sought to justify the withholding of 2% thereof by ordinances which authorized it to tax the stock. So here the coupons give the plaintiffs the right to their 5½% and 6% interest and the defendants by means of the resolutions are proposing to call the bonds and stop the payment of any further interest. Here as in the *Murray* case the Supreme Court of the state gave judgment holding that the resolutions were valid, but if plaintiffs' contract did not permit the call the resolutions were invalid, and the question to be decided is what was plaintiffs' contract and was it impaired by the resolutions, which are questions on the merits and not of jurisdiction.

e. The jurisdiction of the United States District Court under Section 41 Title 28 U. S. Code Annotated is determined by the claim set up in the complaint if apparently substantiated and made in good faith.

The above cases are all cases of writs of error to the Supreme Court of the United States under Section 344, Title 28, U. S. Code Ann. In those cases the federal question to give jurisdiction to the Supreme Court of the United States involves two elements (1) has there been set up a sufficient claim that a contract is being impaired by a subsequent law, and (2) has the decision of the state Supreme Court been against the claim? In many of the cases the second element is an important consideration for if the decision of the state Supreme Court has gone off on some other point, there has been no decision against the claim, and the jurisdiction of the United States Supreme Court does not attach because one of the elements required by the jurisdictional statute is absent. When the suit is brought in the Federal Courts in the first instance the only jurisdictional requisite under Section 41, Title 28, U. S. Code Ann. is that a sufficient claim of impairment of contract be made. Consequently, in such cases it is held that all that is required to sustain the jurisdiction of the Federal Court in such cases of original jurisdiction is that the complaint sets up a claim apparently in good faith and not frivolous, that the plaintiff has or claims a contract with a state or municipality which such state or municipality has attempted to impair by subsequent legislation.

Pacific Electric Ry. Co. v. Los Angeles, 194 U. S. 112, 48 Law ed. 896, 24 Sup. Ct. Rep. 586,

Illinois Central RR. Co. v. Adams, 180 U. S.

28, 36, 45 Law ed. 410, 21 Sup. Ct. Rep. 251,

City Ry Co. v. Citizens RR. Co., 166 U. S. 557,
562, 41 Law ed. 1114, 17 Sup. Ct. Rep. 653,

Cuyahoga River Power Co. v. Akron, 240 U.
S. 462, 60 Law ed. 743, 36 Sup. Ct. Rep. 402,
Mosher v. Phoenix, 287 U. S. 29, 77 L. ed. 148,
53 Sup. Ct. Rep. 67,

South Covington Etc. Ry. Co. v. Newport, 259
U. S. 97, 66 L. ed. 843, 42 Sup. Ct. Rep. 418.

3. The epoch-making decision of the United States Supreme Court in the case of *Erie R. Co. v. Tompkins* has no application to cases in which the jurisdiction of the Federal Courts is based on a Federal question.

But it may be contended that the above cases were decided prior to the case of *Erie R. Co. v. Tompkins*, 82 L. ed. 1188, 1194, 304 U. S. 64, 58 Sup. Ct. Rep. 817, 114 A.L.R. 1487 and the rules therein stated no longer prevail in the Federal Courts. Such is not the case. The rules stated in the above cases are not affected by the decision in *Erie R. Co. v. Tompkins* for it is expressly stated in the opinion in that case that it does not apply to cases where the jurisdiction of the Federal Courts is based on a Federal question. The express language of the exception being,

“except matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state.”

This exception, indeed, is taken from the Federal Ju-

diciary Act. Section 34 of that act which was originally the Act of September 24, 1789, reads as follows:

“The laws of the several states except where the Constitution, treaties or statutes of the United States otherwise require or provide shall be regarded as rules of decisions in trials at common law in courts of the United States in cases where they apply.”

28 U. S. Code Ann. 725

The following cases decided since the decision of *Erie R. Co. v. Tompkins* hold that that case has no application to cases in which the jurisdiction of the Federal Courts is based upon impairment of the obligation of a contract.

Municipal Investors' Association v. Birmingham, 86 L. ed. 1341, 1343, 316 U. S. 153, 62 Sup. Ct. Rep. 975,

Irving Trust Co. v. Day, 86 L. ed. 452, 457, 314 U. S. 556, 62 Sup. Ct. Rep. 398, 137 A. L. R. 1093,

Wood v. Lovette, 85 L. ed. 1404, 1407, 313 U. S. 362, 61 Sup. Ct. Rep. 983,

Higginbotham v. Baton Rouge, 83 L. ed. 968, 971, 306 U. S. 535, 59 Sup. Ct. Rep. 705,

American Toll Bridge Co. v. RR. Commission of Calif., 83 L. ed. 1414, 1419, 307 U. S. 486, 59 Sup. Ct. Rep. 948,

Note:

140 A.L.R. 731,

Cone v. Rorick, 112 Federal (2nd) 894, 897,

Washington University v. Gorman, 153 S. W.
(2nd) 35, 38 (Mo.)

That Erie R. Co. v. Tompkins was never considered as having application to cases presenting questions of impairment of obligation of contract is shown by the fact that while the Erie case was under consideration there was argued a case in which impairment of a contract was charged. In the opinion filed shortly after the decision in the Erie case federal jurisdiction is recognized and the case disposed of on the merits without mention of the Erie case.

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307,
82 L. ed. 1365, 58 Sup. Ct. Rep. 913.

In addition to the above, the Supreme Court of the United States since Erie R. Co. v. Tompkins has frequently held that where other federal rights claimed under the Federal Constitution or federal laws are involved, the rule of Erie R. Co. v. Tompkins does not apply. Among such cases are the following:

Doench v. Federal Deposit Insurance Corp.,
86 L. ed. 956, 961, 315 U. S. 447, 62 Sup. Ct.
Rep. 676,

Clearfield Trust Co. v. U. S., 87 L. ed. 524
(adv.), 63 Sup. Ct. Rep. 573 (adv.),

Deitrich v. Graeney, 84 L. ed. 694, 309 U. S. 190, 60 Sup. Ct. Rep. 480,

Jackson County v. U. S., 84 L. ed. 313, 316, 308 U. S. 343, 60 Sup. Ct. Rep. 285,

U. S. v. Pink, 86 L. ed. 796, 818, 315 U. S. 203, 62 Sup. Ct. Rep. 552,

Prudence Realization Corp. v. Geist, 86 L. ed. 1293, 1298, 316 U. S. 89, 62 Sup. Ct. Rep. 978,

Bailey v. Central Vt. R. Co., 87 L. ed. 1030 (adv.) 63 Sup. Ct. Rep. 1062,

Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 87 L. ed. 150, 152 (adv.) 63 Sup. Ct. Rep. 172 (adv.),

Fisher v. Whiton, 317 U. S. 217, 87 L. ed 167 (adv.) 62 Sup. Ct. Rep. 175 (adv.),

Garrett v. Moore McCormack Co., 317 U. S. 239, 87 L. ed. 183, 185 (adv.) 63 Sup. Ct. Rep. 246 (adv.),

Wragg v. Federal Land Bank of New Orleans, 87 L. ed. 273, 275, (adv) 63 Sup. Ct. Rep. 273 (adv.),

U. S. v. Pelzer, 85 L. ed. 913, 312 U. S. 399, 61 Sup. Ct. Rep. 659,

Lyon v. Mutual Health Benefit & Accident Asso., 305 U. S. 484, 83 L. ed. 303, 308, 59 Sup. Ct. Rep. 297,

Helvering v. Leonard, 310 U. S. 80, 84 L. ed. 1087, 1092, 60 Sup. Ct. Rep. 780.

In the light of the above array of cases it certainly is clear that the case of *Erie R. Co. v. Tompkins* has no application to cases involving a question arising under the Federal Constitution or federal laws or treaties, or even under non-statutory federal rights or claims based on federal policy. It will be noted that the rule that the Federal Courts must determine federal questions according to their own independent judgment extends to construction of state laws and rules of practice. The rule of *Swift v. Tyson*, 16 Pet 1, 10 Law ed. 865, never did extend to the construction of local statutes and rules of practice, being limited to so-called questions of general law. The rule that Federal Courts would follow the state construction of local statutes and rules of practice was always subject to the exception that such local statutes or rules of practice could not be allowed to defeat or impair a federal right.

Davis v. Wechsler, 68 L. ed. 143, 145, 263 U. S. 22, 44 Sup. Ct. Rep. 13,

Ward v. Love County, 253 U. S. 17, 64 Law ed. 751, 40 Sup. Ct. Rep. 419,

Appleby v. New York, 70 L. ed. 992, 999, 271 U. S. 364, 46 Sup. Ct. Rep. 569,

and since *Erie R. Co. v. Tompkins* the rule remains the same.

Municipal Investors' Asso. v. Birginham, 86

L. ed. 1341, 1343, 316 U. S. 153, 62 Sup. Ct. Rep. 975,

Washington University v. Gorman, 153 S. W. (2nd) 35, 38.

The decisions of this court have consistently recognized the fact that the case of *Erie R. Co. v. Tompkins* does not apply where a federal question is involved.

Getz v. Nevada Irrigation District, 112 Fed. (2nd) 495, 497,

Alameda County v. U. S., 124 Fed. (2nd) 612, 616,

Toole County Irrigation District v. Moody, 125 Fed. (2nd) 498.

In the *Getz* case, *supra*, this court pointed out that the alleged contract was not impaired because it was modified in accordance with a provision therein contained.

In the *Alameda County* case, *supra*, this court says:

“Under the rule of *Erie R. Co. v. Tompkins*, *supra*, state law is applicable to all cases except ‘in matters governed by the Federal Constitution or by acts of Congress’. The exception has been enlarged to include also treaties.”

In the *Toole County Irrigation District* case, *supra*, this court held that it was bound by the later decisions of the Supreme Court of Montana in determin-

ing the nature of the obligation created by the issuance of the bonds there involved. Jurisdiction was based on diversity of citizenship. The existence of a federal question was not alleged nor could it have been because no subsequent statutes, ordinances or resolutions were enacted. The conflicting decisions of the Supreme Court of Montana were all made after the issuance of the bonds involved so that case obviously fell within the rule of *Erie R. Co. v. Tompkins* as a diversity of citizenship case in which the federal courts are bound to apply the law of the state as it exists at the time. Obviously no mention of the fact that the rule of *Erie R. Co. v. Tompkins* did not apply to cases involving a federal question was called for in that case.

(The following proposition No. 4, and the discussion thereunder apply to Assignment No. 2.)

4. The federal courts should not determine the rights of a sovereign state in a controversy with another state or the citizens of another state by applying the law of either state.

A number of the cases above cited hold that the rule of *Erie R. Co. v. Tompkins* does not apply to cases involving federal contracts or policies. The reason back of these decisions must be that since the Constitution gives the federal courts jurisdiction over cases to which the United States is a party, it is the duty of those courts to protect the rights of the United States according to the general law of the land rather than the decisions of the courts of a particular state. We think the same principle applies to sovereign states. Federal courts are given jurisdiction of suits

to which a state is a party. The fact that this jurisdiction is conferred seems to imply that the intention is to provide that states will be protected in their rights according to the general law of the land rather than be subject to the municipal law of some other state. This rule has long been recognized:

Kansas v. Colorado, 185 U. S. 125, 146, 46 L. ed. 838, 22 Sup. Ct. Rep. 552,

Missouri v. Illinois, 200 U. S. 496, 520, 521, 50 L. ed. 572, 26 Sup. Ct. Rep. 268,

Kansas v. Colorado, 206 U. S. 46, 97, 51 L. ed. 956, 27 Sup. Ct. Rep. 655,

South Dakota v. North Carolina 192 U. S. 286, 48 Law ed 448, 24 Sup. Ct. Rep. 269,

North Dakota v. Minnesota, 263 U. S. 365, 68 L. ed. 342, 44 Sup. Ct. Rep. 138,

Connecticut v. Massachusetts, 282 U. S. 660, 75 L. ed. 602, 51 Sup. Ct. Rep. 286,

→ Washington v. Oregon, 297 U. S. 517, 80 L. ed. 837, 56 Sup. Ct. Rep. 540.

In the case of Washington v. Oregon, *supra*, the Supreme Court says:

“In such circumstances an injunction would not issue if the contest were between private parties at odds about a boundary. Still less will it issue here in a contest between states, a contest to be dealt with in the large and ample way that alone

becomes the dignity of the litigants concerned." In a number of cases the Supreme Court of the United States has said: that contests between the states take the place of the treaty power between nations of which the states were deprived by the Constitution, and that in questions arising between the states disputes are to be settled "on the basis of equality of right"; that while municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. The principles of right and equity are to be applied with regard to the equal level or plane on which all the states stand.

See:

Connecticut v. Massachusetts, 282 U. S. 660,
75 L. ed. 602, 607, 51 Sup. Ct. Rep. 286,

Kansas v. Colorado, 206 U. S. 46, 97, 51 L.
ed. 956, 27 Sup. Ct. Rep. 655.

That the rule of the above cases is not affected by the decision of the Supreme Court in *Erie R. Co., v. Tompkins*, is evident from the case of,

Hinderlider v. LaPlatta R. & Cherry Creek D. Co., 304 U. S. 92, 82 L. ed. 1202, 58 Sup. Ct. Rep. 803,

in which the opinion was rendered by Justice Brandeis on the same day as the opinion in *Erie R. Co., v. Tompkins*. In the *Hinderlider* case, the court says:

"For whether the water of the interstate stream must be apportioned between the two states is a

question of federal common law upon which neither the statutes nor the decisions of either state can be conclusive.”

This language is readily reconciled with the statement in *Erie R. Co. v. Tompkins*, that,

“There is no federal *general* common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or general, be they commercial law or a part of the law of torts.”, (*Italics ours*).

by referring to the definition of common law given in *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655, cited in the *Hinderlider* case, in which the court says:

“For after all the common law is but the accumulation of the expression of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.”

Bearing this definition in mind, it is apparent that what Justice Brandeis had in mind when he said in the *Erie R. Co.* case, “There is no federal general common law,” and in the *Hinderlider* case, that the apportionment of the water of an interstate stream between two states is a question of “federal common law upon which neither the statutes nor the decisions of either state can be conclusive”, was that federal common law extended only to those subjects upon which the federal courts were given the power to render independent

decisions. The basis of the decision in the *Erie R. Co.* case was that ordinarily, they were given no such power unless a federal question was involved, but the *Hinderlider* case and the cases theretofore decided in suits between states recognized that the Federal Courts were given the power to declare the law in suits between states upon the general basis of equality of right and thus had the power to create a federal common law applicable to those cases. That this federal common law in suits between states is not limited to questions of boundaries and interstate streams, but extends to all controversies between states, is apparent from the case of *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269, in which state of South Dakota obtained a money judgment without interest on North Carolina State Bonds, by application of the principles of federal common law governing rights among the states.

While the above are cases with states on both sides, the principle applies wherever the rights of a sovereign state are involved even though those rights are represented by a county or other subdivision of the state.

In a recent case involving an action by the United States to recover taxes paid to a county under protest upon behalf of Indian wards, the question arose as to whether interest was to be charged against the county. The court, after indicating that if the action were against a private litigant interest would be allowed, states the following:

“But the present case introduces an important

factor not present in former decisions. The litigation is not between the United States and a private litigant but between the United States and the political subdivision of a state. In effect, therefore, we have another aspect of our task in adjusting the interests of two governments within the same territory. Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but defining the extent of that right with relation to the operation of state laws is relevant. The state will not be allowed to invade the immunities of Indians no matter how skillful its legal manipulations. * * * Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights. * * * Nor may the right to recover taxes illegally collected from Indians be unduly circumscribed by state law * * * Again, state notions of laches and state statutes of limitations have no applicability to suits by the government whether on behalf of Indians or otherwise. This is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments.

“But the recovery of interest in inter-governmental litigation has no such roots in history. Indeed, liability for interest is of relatively recent origin and the rationale of its recognition or denial is not always clear. That it is not a congenial rule in our law is indicated by its denial in *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 S. Ct. 920, on grounds of ‘public

convenience.' Since Congress has, in the legislation implementing the Indians' tax immunity, remained silent as to recovery of interest, we need not presume that it has impliedly fixed liability for interest in a suit like the present.

"Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature * * *, Congress has left us free to take into account appropriate considerations of 'public convenience.' * * * Nothing seems to us more appropriate than due regard for local institutions and local interest. We are concerned with the interplay between the rights of Indians under federal guardianship and the local repercussion of those rights. Congress has not been heedless of the interests of the states in which Indian lands were situated, as reflected by their local laws. * * * With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. * * * In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved taxpayers in their relation with the states or their political subdivisions. To respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate. * * * Such is this court's doctrine regarding the imposition of

interest in cases where this court has fashioned its own doctrine.”

Jackson County v. United States, 84 L. ed. 313, 317, 308 U. S. 343, 60 Sup. Ct. Rep. 285.

In the above case the Supreme Court of the United States announced the rule that in a case involving the states or their political subdivisions the public interest requires that the courts should not be bound by the rules of local law. Indeed, in a case involving a sovereign state the federal courts cannot be bound to follow the rule of law existing in one of those states for the rule of law in the other state may be different. In this case the State of Washington having purchased negotiable bonds offered to the public generally by Maricopa County, a subdivision of the State of Arizona, cannot reasonably be held to accept whatever rule of law the State of Arizona may lay down in litigation among its own officials in which the State of Washington has had no opportunity to urge its rights. The State of Washington has the right under the Federal Constitution which gives it the right to have its case determined in the federal courts, to assert its sovereignty and require the federal courts to determine the contest between it and Maricopa County as a local subdivision of the State of Arizona, according to the independent judgment of the federal courts.

When the Constitution of the United States created the Federal Judiciary and provided that it should have jurisdiction over all suits in which a state is a party, it did not mean that that jurisdiction could be defeated by a decision of the Supreme Court of the state of which its opponent is a legal subdivision, with-

out the state even having the right to a hearing. Suppose the Attorney General of the State of Washington had brought a suit against the State Treasurer of Washington enjoining him from surrendering the bonds held by that state and the Supreme Court of Washington had issued the injunction. Would not that decision be entitled to equal respect in the federal courts with the Arizona mandamus suits? It is preposterous to assume that the Constitutional right of the State of Washington to resort to the federal courts is so futile that all the federal courts can say to it is, "you are bound by the decision of your opponent which was made without giving you a hearing and undoubtedly for the express purpose of precluding you from asserting your rights."

II

The Statutes of Arizona In Effect When Plaintiffs' Bonds Were Issued Are Not Capable of Being Construed So As to Make Plaintiffs' Bonds Callable Before Their Maturity Dates.

1. Construction of statutes under which bonds were issued:

Assuming that we have satisfied the court that it has jurisdiction to exercise its independent judgment in determining whether or not plaintiffs' bonds are callable, we turn now to the question of the proper construction of the statutes under which they were issued. Plainly the bonds and coupons attached thereto do not provide for call before maturity (T. 59, 63). Beyond question both issues of bonds and coupons are in ex-

act compliance with Chapter 2, Title 52, Revised Statutes of 1913 (T. 7-11). After their form was determined they were ratified by acts of the legislature (T. 19, 28). The argument is advanced, however, by the defendants and it has been sustained by the Supreme Court of Arizona that Chapter 1, Title 52, modifies Chapter 2, Title 52, so as to authorize the call of bonds issued under the last-named chapter. Specifically, the argument is that the following language in Section 5252, Arizona Revised Statutes of 1913,

“and for the purpose of paying, redeeming and refunding all or any part of the principal and interest of the existing and subsisting state legal indebtedness and also that which may at any time become due or is now or may be hereafter authorized by law, the said commissioners shall from time to time issue negotiable coupon bonds of this state when the same can be issued at a lower rate of interest than previously paid on state indebtedness and to the profit and benefit of the state,”

authorizes the call of outstanding state bonds that have been issued with definite maturity dates, before their maturity, and the following words in Section 5260 Arizona Revised Statutes 1913,

“and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness upon the official demand of said authorities in the same manner as other state indebtedness and they shall issue bonds for any indebtedness now allowed or that may be hereafter allowed by law to said coun-

ty, municipality or school district upon official demand by said authorities,”

extends the authority of the state loan commissioners to the calling of county, municipal and school district bonds that have been issued with definite due dates before their maturity.

2. Origin of Chapter 1, Title 52, Revised Statutes of 1913.

Passing for the present the gap in the reasoning by which the last result is reached, we proceed to a consideration of said Chapter 1, Title 52. The origin of this statute is revealed by an examination of Arizona territorial and state legislation and is established by the Supreme Court of Arizona in the case of *Maricopa County v. Osborn*, 136 Pac. (2nd) 270, 272 (adv) in which that court shows that Paragraph 2987 Arizona Revised Statutes 1887 though long since repealed was continued in force by Section 5258, R. S. of 1913, which is a part of said Chapter 1, Title 52, by reason of the fact that it was adopted by reference by the Act of Congress of June 25, 1890, which later became said Chapter 1, Title 52.

a. Act of Congress of June 25, 1890, limited to existing bonds. (See Exhibit G, this Brief.)

The meaning of the Act of Congress of June 25, 1890 was definitely understood when the act was adopted. It did not extend to the refunding of bonded indebtedness incurred after its date and ended with floating indebtedness incurred to December 31, 1890. (Arizona Revised Statutes,

1901, pages 104-109. See Exhibit G, this Brief.) By the Act of August 3, 1894, it was extended as to territorial warrants only, issued prior to December 31, 1895. (Arizona Revised Statutes, 1901, pages 109-110. See Exhibit H, this brief.) And by the Act of June 25, 1896, was extended to both territorial and county, municipal and school district indebtedness incurred up to January 1, 1897. (Gage vs. McCord, 5 Ariz. 227, 51 Pac. 977. See Exhibit I, this brief.) It never extended to any indebtedness of any kind incurred after the last mentioned date. The foregoing appears from the language of the acts of Congress, from reports of the committees recommending adoption of said act, (see Exhibits A, B, C and D attached to this brief,) and from the acts of the territorial legislature (see Act 79 Session Laws of 1891 and Act 33 Session Laws of 1895) and the decisions of the Supreme Court of the Territory.

Gage v. McCord, 5 Ariz. 227; 51 Pac. 977, 978.
Schuerman v. Territory, 7 Ariz. 62; 60 Pac. 895.

9. Act of Congress June 25, 1890 did not authorize call of bonds before maturity.

It was definitely understood that the Act of Congress of June 25, 1890, did not authorize the refunding of any bonds before their due dates unless they were voluntarily surrendered by the holders thereof. This appears from the report of of the committee of Congress and the official

statement of Mr. Murphy, a former governor of Arizona, in his presentation to Congress, as an Arizona territorial delegate (see Exhibits "C" and "D" this brief). If there is otherwise any doubt as to the meaning of an act of Congress reference to the reports of the committee in charge of the legislation will be accepted as determining the question.

Binns v. U. S. 194, U. S. 486, 495, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816.

Wright v. Vinton Branch 300 U. S. 440, 463, 81 L. ed. 736, 57 Sup. Ct. Rep. 556.

It is, therefore, clear that the Act of Congress of June 25, 1890, which afterwards became Chapter 1, Title 52, Revised Statutes of 1913, as it stood before Arizona became a state, did not authorize what the Supreme Court of Arizona has now held it did authorize in 1919 and 1921.

Maricopa County v. Osborn, 125 Pac. (2nd) 703.

Thus the decision of the Supreme Court of Arizona must be erroneous unless the meaning of said Act of Congress of June 25, 1890 was changed in some manner before it became Chapter 1, Title 52, Revised Statutes of 1913. Said Act of June 25, 1890, became a law of the State of Arizona by virtue of Section 2, Article 22 of the state constitution insofar as it was not inconsistent with said constitution and as such law of the state it was subject to all interpretations it had theretofore received.

Mallory v. Pioneer Southwestern Stages, 54 Fed. (2nd) 559, 562,

Stevirmac Oil & Gas Co. v. Smith, 259 Fed. 650, 654,

Patterson v. Rousney, 159 Pac. 636, 639.

The interpretations placed upon said act before statehood have the same effect as interpretations placed thereon after statehood.

Frick Co. v. Oats, 94 Pac. 682, 686.

Said Chapter 1, Title 52, was thereafter enacted without change so far as the questions here involved are concerned as Chapter 29 of the first special session of the first legislature of the State of Arizona. Such re-enactment continued the statute with the meaning that had theretofore been attributed to it by the courts.

Heald v. District Court, 254 U. S. 20, 22, 65 Law ed. 106, 41 Sup. Ct. Rep. 42,

Johnson v. Manhattan R. Co., 289 U. S. 479, 77 L. ed. 1331, 1346, 53 Sup. Ct. Rep. 721,

Moore v. Chilson, 26 Ariz. 244, 254, 224 Pac. 818.

The same rule applies in case of executive or legislative construction.

National Lead Co. v. U. S., 252 U. S. 140, 64 L. ed. 497, 499, 40 Sup. Ct. Rep. 237,

U. S. v. Hermanosy Compania, 209, U. S. 337, 339, 52 Law ed. 821, 28 Sup. Ct. Rep. 532.

Thereafter the statute was made a part of the compilation known as the Revised Statutes of 1913. Its inclusion in said compilation under the authority of Chapter 64, third special session of the first legislature of the State of Arizona (T. 156-166) did not change its meaning for Section 7 of said act expressly provides the code commissioner shall have no power to change or modify any law (T. 159), and the rule is well established that in the case of such a compiled code as distinguished from a revised code, the separate enactments retain the meanings and relative status they had before the compilation.

Waterman S. S. Co. v. Brill, 9 So. (2nd) 23, 27,

Southern Pac. Co. v. Gila County, 56 Ariz. 499, 503, 109 Pac. (2nd) 610,

Warner v. Goltra, 79 L. ed. 254, 259, 293 U. S. 155, 55 Sup. Ct. Rep. 46,

State v. Purcell, 228 Pac. 796 (Idaho),
Gembler v. Seward, 285 N. W. 542, 545 (Neb.),

Paulson v. Hurlburt, 183 Pac. 937, 939 (Or.)

The Supreme Court of Arizona has declared that the passage of the act along the course above mentioned did not have the effect of eliminating

the long-forgotten Paragraph 2987 Revised Statutes of 1887, notwithstanding its repeal.

Maricopa County v. Osborn, 136 Pac. (2nd) 270, 272 (Adv.)

We think it is clear from the foregoing that Chapter 1, Title 52, Revised Statutes of 1913, cannot be construed so as to authorize the call of plaintiffs' bonds before their maturity dates and that the Supreme Court of Arizona erred in so construing it in the first mandamus suit, it not being advised of the origin of the statute in that case.

c. Repeal by re-enactment of Chapter 2, Title 52.

But the foregoing is not all. Chapter 2, Title 52, Revised Statutes of 1913, was re-enacted in its entirety as Chapter 20 of the acts of the third special session of the first legislature of the State of Arizona (T. 135-156). This undoubtedly was preparatory to its inclusion in the 1913 compilation. Chapter 1 of said Title 52 was not so re-enacted (T. 134-135). Thus, the two chapters went into the 1913 compilation with said Chapter 2 as the later enactment and undoubtedly repealing all provisions in said Chapter 1, the earlier enactment, which were inconsistent with said Chapter 2. Said Chapter 2 (see page 31 of this brief) provided for the issuance of bonds with definite maturity dates and both in the title and the body of the act provided for the redemption of said bonds *after* but not before maturity,

so any provision in said Chapter 1, providing for *redemption* before maturity, was unquestionably inconsistent with the provision in said Chapter 2, providing for *redemption* after maturity (see page 16 of this brief).

Furthermore, there has been in the statutes of Arizona since an early date, a statute which was dropped out in 1901, but re-enacted in 1907, and again re-enacted by the first legislature of the state at the third special session, (Sec. 5553, Title 58 Revised Statutes 1913) just prior to the adoption of Chapter 2, Title 52, a statute which declared that when a later statute covered a subject an earlier statute should not be deemed continued merely because it was consistent with the later statute but should be deemed abrogated and repealed. See Sec. 5553 Revised Statutes of 1913). Under this provision certainly Chapter 2, Title 52, covering the subject of redemption of bonds and providing that redemption might be made after maturity, certainly repealed that part of Chapter 1, Title 52, which according to defendants' contention provided for redemption at any time.

Olson v. State, 36 Ariz. 294, 301, 285 Pac. 282,
Murphy v. Utter, 186 U. S. 95, 105, 46 Law ed.
1070, 22 Sup. Ct. Rep. 776,

District of Columbia v. Hutton, 143 U. S. 18,
27, 36 L. ed. 60, 12 Sup. Ct. Rep. 369,

Grant v. Baltimore & Ohio R. Co., 66 S. E.
709 (W. Va.),

Harris v. Cooley, 152 Pac. 300 (Cal).

Chapter 64 of the Acts of the third special session of the first legislature providing for the compilation of all laws in force upon the adjournment of the third special session of the first legislature, expressly provided that the code commissioner should have no power to change the meaning of any of the laws (T. 157-166). It is difficult to discover anything that the first legislature of the State of Arizona might have done to make more clear its intention that the bonds to be issued under Chapter 2, Title 52, should not be impaired by anything contained in Chapter 1, Title 52.

3. Many other reasons exist why the refunding provided for by Chapter 1, Title 52, cannot be construed as authorizing the refunding of bonds issued under

Chapter 2, Title 52. Among these are:

a. Chapter 1, Title 52, Revised Statutes of 1913, never did authorize the refunding of indebtedness to be created after the passage of the statute. The original Act of Congress of June 25, 1890, from which the language was derived, required the boards of supervisors to report their bonded and outstanding indebtedness, meaning existing indebtedness, and the subsequent words "and they shall issue bonds for any indebtedness * * * that may hereafter be allowed by law" meant indebtedness existing but not yet allowed when the act was passed. This is made clear by the proviso in Section 15 of the act to the effect

that, "existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on territorial, county, municipal and school government for the year ending December 31, 1890, may also be funded and bonds issued for the redemption thereof," (see pages 108-109 Revised Statutes 1901).

The effect of the proviso was to extend not to limit the language in the preceding section. The words, "allowed by law" had reference to allowance of claims by the boards of supervisors as found in the then existing statutes, providing for the government of counties.

Section 407 of the Revised Statutes of 1887 provided "no payment shall hereafter be made from the treasury of any of the counties of this territory unless the claim or demand shall be duly allowed according to the provisions of this act." The word, "allowed", is frequently used in the same sense in the succeeding sections which provide for the allowance of claims against the county.

A similar method for establishing school district indebtedness is provided for in Section 1495 Revised Statutes of 1887. The word "allowed" with reference to indebtedness retained the same meaning in the Revised Statutes of 1913, Sections 2433-2439 Revised Statutes of 1913. The code commissioner and legislature in preparing the 1928 Code unquestionably so understood the

meaning of the word "allowed" and changed the same to "allowed to be incurred" so as to provide for the refunding of indebtedness to be incurred in the future (Sec. 2654 Revised Code 1928).

b. The intent of Congress in the Act of June 25, 1890, was clearly to reduce the high rate of interest on county indebtedness by permitting the same to be refunded as territorial indebtedness. It so appears from the committee report (Exhibit "A"). The act provided that bonds should be issued by the loan commissioners as territorial bonds without limiting the obligation of the territory (see Pars. 2041, 2047, pages 104-106 Revised Statutes of 1901). The provision in Paragraph 2041 that the faith and credit of the territory is pledged to secure the bonds clearly applies to all the indebtedness, local as well as territorial, refunded under the act. Besides, there was an express provision that if there was not sufficient money in the interest fund the interest should be paid out of the general fund of the territory (Par. 2050). True, the act contemplated, and the territorial act passed to supplement the same (Act 79, page 97 Session Laws 1891) provided, that the local subdivisions should reimburse the state, but the faith and credit of the state was back of the bonds. That such was the proper interpretation of the act is shown by Paragraph 6th of Article 20 of the State Constitution which provided that all debts of the counties, valid and subsisting at the time of the passage of the Enabling Act, were assumed by the state, but the same constitution made it impossible for the

state to assume any county indebtedness after statehood, for Section 5 of Article 9 of the state constitution absolutely prohibited the state from incurring any indebtedness except for certain limited purposes therein stated. The result was that if Section 5260 Revised Statutes of 1913 had authorized the refunding of county indebtedness by the state loan commissioners it would have been in violation of the state constitution. The code commissioner and legislature in 1928, realizing this changed the language of the act so as to provide that county bonds issued by the loan commissioners should not be secured by the faith and credit of the state and that the state should have no obligation thereon except to levy taxes in the counties and collect the same (Sec. 2654 Revised Code 1928).

c. Long continued construction of act should govern.

The long continued construction of the act from its adoption in 1890 down to 1942 is at variance with the construction contended for by defendants. Beginning with Section 15 of the Act of 1890 (Exhibit "F") and the extensions by the Acts of 1894 (Exhibit "G") and 1896 (Exhibit "H") the statements in the reports of the Congressional committees on those acts (Exhibits "A", "B", "C", "D") statement of Governor Murphy (Exhibit "D"), the fact that the territorial acts adopted in furtherance of the acts of Congress, show no indication of intent to call bonds not voluntarily surrendered (see page 27 this

brief), the numerous acts passed between 1896 and statehood, providing for the issuance of optional bonds (Exhibit "E"), which were all at variance with the interpretation contended for by defedants, and the fact that no attempt was made after statehood to refund unmatured bonds but other refunding acts were passed to provide for refunding only optional bonds (Chapt. 39 Session Laws 1927 and Chapters 74 and 75 Session Laws 1935), and the fact that Title 2, Chapter 52, and the chapter providing for the issuance of school district bonds where the indebtedness was less than 4% (Secs. 2736-2749 Revised Statutes of 1913), all provided for definite due dates, the former providing for redemption of the bonds only after maturity, and the later providing for a sinking fund to redeem on maturity, all show a construction of the act at variance with defendants' contention.

d. Subsequent legislative construction of act limits it to past due and optional bonds.

The fact that the legislature enacted Chapter 39 Session Laws of 1927 and Chapter 74 and Chapter 75 Session Laws of 1935, providing for the refunding of county, municipal and school district bonds and state bonds, respectively, only when they were callable, is clearly a subsequent legislative construction of the acts under which the bonds were issued to the effect that the provision in Chapter 1, Title 52, providing for refunding was not available to force the call of such bonds when they were not optional.

Moore v. Pleasant-Hassler Construction Co.,
51 Ariz. 40, 48, 76 Pac. (2nd) 225,

Alexander v. Mayor, 5 Cranch 1, 7, 3 Law ed.
19

The case of Moore v. Pleasant-Hassler Construction Company, *supra*, is a definite decision by the Supreme Court of Arizona to the effect that where a subsequent act of the legislature shows what was the intent of the legislature in adopting a prior statute, such intent will be followed by the courts. It will be noted in this case the meaning of the prior act was not drawn in question until after the subsequent acts of the legislature were passed so that this case comes under the dissenting as well as the majority opinion in the Pleasant-Hassler case.

e. Chapter 1, Title 52 applies to matured and optional bonds *only*.

It is plain that the language of Section 5260, Revised Statutes of 1913, independently considered by this court, ought not to be construed as having the drastic effect of permitting the call of plaintiffs' bonds before maturity. Inasmuch as this language is a verbatim reenactment of the Act of Congress of June 25, 1890, and must have the same meaning as the original statute, to give it that construction requires us to assume that Congress deliberately enacted an unconstitutional statute. The Act of Congress of June 25, 1890 applied only to bonds which were outstanding on the date of its enactment. Such a construction, therefore, requires us to assume that Congress in-

tended to compel the holders of outstanding bonds, which were not redeemable prior to their maturity, to surrender their bonds for payment, which would make the act unconstitutional on the ground that it impaired the obligation of existing contracts. While Section 1 of Article X of the Federal Constitution does not apply to Congress, nevertheless such an act would be void as depriving the holders of the bonds of their property without due process of law.

Choate v. Trapp, 224 U. S. 665, 56 Law ed. 941,
32 Sup. Ct. Rep. 565,

Lynch v. United States, 292 U. S. 571, 78 L. ed.
1434, 54 Sup. Ct. Rep. 840.

Such an interpretation is unthinkable, and is manifestly contrary to the intent of Congress as is clearly shown by Exhibit D. If the Act of Congress of June 25, 1890 had no such intent, then, obviously, the same language had no such intent when it was reenacted verbatim by the first legislature of the State of Arizona.

Considered from the standpoint of the first legislature of the State of Arizona, defendants' construction requires us to assume that that legislature intended to make callable before the beginning of the option period, all of those bonds issued prior to statehood which had not yet reached the option period (See Exhibit E attached to this brief) and this clearly would render said act unconstitutional as impairing the obligation of the contract created by the issuance of those bonds. It is the rule in Arizona as well as elsewhere that where two constructions of an act are possible,

one of which will render the act unconstitutional, that construction which renders it valid, will be adopted.

McManus v. Industrial Commission, 53 Ariz. 22, 28, 85 Pac. (2nd) 54,

Automatic R. M. Co. v. Pima Co., 36 Ariz. 367, 373, 285 Pac. 1034,

Prescott Courier, Inc. v. Moore, 35 Ariz. 26, 34, 274 Pac. 163.

State of Arizona, v. Hooker, 45 Ariz. 202, 206, 41 Pac. (2nd) 1091,

Stewart v. Robinson, 45 Ariz. 143, 150, 40 Pac. (2nd) 979,

Oglesby v. Pacific Finance Corporation, 44 Ariz. 449, 453, 38 Pac. (2nd) 646.

Even if no constitutional question were involved the reasonable construction would be to limit the refunding under Chapter 1, Title 52, to cases where the bonds were optional or past due or voluntarily surrendered by the holder. This was the construction arrived at by the Supreme Court of Missouri in the only case that we have found squarely upon the point.

State v. Smith, 96 S. W. (2nd) 348, 351 (Mo.)

f. Provisions of Chapter 1 not to be read into Chapter 2.

Ordinarily when an act or a chapter contains a complete procedure for the issuance of bonds and another act or chapter contains provisions

for the issuance of different bonds, the provision of the latter act will not be applied to the former act for the presumption is that each of the acts were intended to be complete in themselves and the provisions of the one should not be read over into the other. Thus, in Arizona, there has existed side by side since 1913, the act providing for the issuance of bonds in excess of 4% which was applicable to school districts (Chapter 2, Title 52, Revised Statutes of 1913) and the act providing for the issuance of bonds by school districts for indebtedness less than 4% (Sections 2736-2749 Revised Statutes of 1913). It has never been contended that the provisions of one of these acts was applicable to bonds issued under the act, and the Supreme Court of Arizona has definitely held that such is not the case.

Armer vs. Wade, 48 Ariz. 1, 58 Pac. (2nd) 525
This principle is equally applicable to this case. The provisions of Chapter 1, Title 52, have no application to the provisions of Chapter 2, Title 52, because said Chapter 2 is complete in itself and there is nothing to indicate that the bonds therein provided for were to be added to or deducted from by statutes providing for other and different bonds. The principle is applied in other states as well as in the State of Arizona.

State v. Keith, 66 Pac. (2nd) 1059 (Okla.)

g. Section 5260, which is found in Chapter 1, Title 52, Revised Statutes of 1913, does not say that bonds of counties, municipalities and school districts shall be callable, nor does it say that they

shall be refundable when the refunding bonds can be issued at a lower rate of interest or to the profit and benefit of the county. It merely says that:

“Said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness upon the official demand of said authorities in the same manner as other state indebtedness and they shall issue bonds for any indebtedness now allowed or that may be hereafter allowed by law to said county, municipality or school district upon official demand by said authorities.”

Refunding “in the same manner” covers only the procedure for refunding and does not purport to give to the counties, municipalities or school districts the substantive right to issue notice and call the outstanding bonds.

Wilders S. S. Co. v. Low, 112 Fed. 161, 164.

It is a little absurd to say that under this general provision a small issue of school district bonds in a remote part of the state may be called by publishing a notice in the county where the state capital is situated.

h. Bond were ratified in form issued.

After a contract for the 1919 issue of bonds had been entered into between the county and the purchasers, the legislature of the state adopted Chapter 54 Session Laws of 1921 (See Exhibit

J this brief) which ratified these bonds and the contract for the purchase thereof (T. 19). The contract for the purchase specifically provided for the delivery of bonds running for the period of years mentioned in the resolution for their issuance, which was of record. The form of the bonds had been adopted by the board of supervisors long prior to the passage of this act and the bonds had been printed (T. 19). We think it is clear that it must be presumed that the legislature in ratifying these bonds and this contract knew what the bonds and the contract contained and they also must be presumed to have known what the law was, so when they ratified these bonds they made them valid as they stood, and that if there had been any variation between the bonds as issued and the law that variation was eliminated, for it was the very intent and purpose of the act that these bonds should be made good as they stood.

Ryan v. Humphries, 150 Pac. 1106, 1108.

For the second issue of bonds there is a similar ratification by Act 86 of the 1921 Session Laws. (See Exhibit K this brief.) When this ratification act was passed these bonds had not been issued but the form had been adopted and had been made a matter of public record (T. 28-29). This act ratifies the bonds as they stand but there was at the time no contract of purchase. While the case is not as strong as in the case of the first issue, in that no purchase contract was ratified, we think here too that the legislature ratified the bonds as they stood.

i. *Bonds are Negotiable*

Another question is presented. These bonds and the coupons attached thereto are negotiable instruments. We know of no reason why Maricopa County may not be bound by a negotiable bond issued under the authority of the legislature of the state, and that these bonds were so issued cannot be questioned, because the ratifying acts provided the authority if it had not previously existed. The bonds and coupons on their face provide for payment of interest until certain dates. The purchaser of these bonds and coupons was entitled to rely on their face. This point was presented to this court in the Getz case, where this court found that the coupons upon which the suit was brought were not negotiable by reason of the fact that they were not payable at all events.

Getz v. Nevada Irr. District, 112 Fed. (2nd) 497.

The coupons on the bonds in this case are so payable. If the contract had been as claimed by defendants, they should have had the exception that was contained in the coupons in the Getz case, but here they did not have that exception and, therefore, in this case the plaintiffs are entitled to claim as holders in due course.

j. *County is estopped.*

There can be no doubt that the defendant, Maricopa County, is estopped to question the covenants in these bonds and coupons to pay inter-

est until their maturity dates. Ordinarily in cases of this kind there is no estoppel against such a contention as the defendants here make for the reason that such contention is based upon the law and if the law did not authorize the bonds in the form in which they were issued, they were issued without authority, and the county or municipal corporation cannot be estopped by the acts of its officers beyond their authority, but in this case the legislature which has the power to confer the authority, either before or after their issuance, has definitely established that the authority to issue these bonds existed by the ratification acts. The result is that Maricopa County is in a position of having legally issued bonds and coupons containing a definite agreement to pay the interest on these bonds exactly as is claimed by the plaintiffs. The bonds and coupons are negotiable and are issued to the public at large. The public has a right to rely on the face of the instrument for the reason that they need not go back of the ratification act. Ordinarily, of course, a purchaser of bonds must examine the proceedings of record and the law and will be charged with notice of what he would find by such examination but that is because the officials who issued the bonds have no authority to issue bonds at variance with such proceedings and the applicable law, and have no power to relieve the purchaser from the duty of making such investigation, but the legislature of the state clearly has the power to say that a purchaser of the bonds of a county or municipality may rely upon the face of the instruments without making an in-

vestigation of the proceedings or the law, and that is exactly what the legislature has done by the ratification acts in this case. A private individual having issued bonds and coupons such as this would find it absolutely impossible to escape payment of the interest in the manner contended here by the defendants. The question of the authority of the agents to make recitals which is the determining factor in most cases is absent here because these bonds are unconditionally authorized by the legislature. The estoppel is as complete as where it operates directly against the principal.

See:

Town of Coloma v. Eaves, 92 U. S. 484, 23 Law ed. 579,

Waite v. Santa Cruz, 184 U. S. 302, 321, 46 Law ed. 552, 22 Sup. Ct. Rep. 327,
Note 86 A.L.R. 1057.

4. *The Decisions of the State Supreme Court in the*

Two Mandamus Cases Are Not Persuasive.

a. It is settled that the weight that will be given to the decisions of the Supreme Court of the state in such a case varies according to the circumstances of the particular case. There are many factors in this case detracting from the weight that should be given the decisions of the Supreme Court in the mandamus cases. One of these is the nature of the case. These mandamus suits are undoubtedly between parties whose interests all lay on the same side of the litigation,

as no bondholders were parties. Decisions made in such noncontroversial litigation should not be given great weight.

U. S. v. Johnson, 87, L ed. 1027 (adv.) 63 Sup. Ct. Rep. 1075 (adv),

Day v. Buckeye Irr. Co., 28 Ariz. 466, 476, 237 Pac. 636.

b. It is the duty of the federal courts to protect the rights of persons who claim under the Federal Constitution or laws. That is why the constitution of the United States created those courts and gave them jurisdiction. That is also the object of the federal statutes. To permit such federal rights to be disregarded by reason of decisions of the state courts in suits to which the persons claiming the federal rights are not parties, would undoubtedly deprive such persons of their property without due process of law.

Postal Telegraph Cable Co. v. Newport, 247 U. S. 464, 476, 62 L. ed. 1215, 38 Sup. Ct. Rep. 566,

Brinkerhoff Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L ed. 1107, 1112, 50 Sup. Ct. Rep. 451.

c. Another reason why the decision of the Supreme Court of Arizona in the two mandamus suits is not entitled to great weight is that the opinions of said court show that of the various questions presented by this case only one was considered by the Supreme Court of Arizona and that one was decided without consideration of the his-

tory of the statutes on which a correct decision must find its basis. The decision of the Supreme Court of Arizona was based entirely on a superficial examination of the language of Chapter 1, Title 52, Revised Statutes of 1913, and from such superficial examination the conclusion was reached that said Chapter 1, Title 52, applied to and modified the bonds issued under said Chapter 2, Title 52. The decision of the State Supreme Court gave no consideration to the original meaning of said Chapter 1, nor to the legislative construction thereof, nor to the repeal by Chapter 2, Title 52. The attention of the court never was called to either of the ratification acts, nor to any of the subsequent refunding acts indicating the legislative policy of the state, entirely at variance with the decision reached by the court. Naturally, in giving weight to the decision of the Supreme Court of the state, only what the Supreme Court has considered and acted upon may be considered. The question of the negotiability of the bonds and the estoppel of the county were not considered, nor could these questions have been considered in these mandamus suits for there was no one present before the court to raise the questions of bona fide purchaser or of estoppel which must be affirmatively presented.

d. The Supreme Court of Arizona in the first mandamus suit, 125 Pac. (2nd) 703, fell into an obvious error. It holds that the provision for refunding state bonds applies to all bonds of the state and county, municipal and school district bonds as well, so as to authorize the calling of

those bonds, notwithstanding they have been legally issued with definite maturity dates. Then it proceeds to hold that the refunding bonds themselves when issued are not subject to so being called for the reason that in another section of the same act there are provisions for making those bonds callable only after the expiration of a certain period of years. In other words, it decides that this refunding provision does not prevail over definite due dates in the refunding bonds but does prevail over definite due dates in bonds issued under any other act. This is an impossible conclusion. The refunding provision is in general terms. It must prevail over all provisions in conflict whether in the same act or elsewhere, or it must yield to all such contrary provisions. The distinction made by the state Supreme Court cannot be accepted by the federal courts.

The Supreme Court of Arizona in the first mandamus suit, *Maricopa County v. Osborn*, 125 Pac. (2nd) 703, wholly overlooked the distinction between the provisions in Chapter 1, Title 52, Revised Statutes, 1913, and the provision in Article 4, Chapter 10, of the Arizona Annotated Statutes of 1939, relating to the faith and credit of the state. In the first act a provision is found that the refunding bonds shall be issued upon the faith and credit of the state. In the 1939 act a provision is found that they shall not be so-issued. The Supreme Court of Arizona evidently was under the impression that the provision of the latter act was contained in the former act.

Likewise, the opinion of the Supreme Court of Arizona in the first mandamus suit, *Maricopa County v. Osborn*, 125 Pac. (2nd) 703, considers Chapter 1, Title 52, Revised Statutes of 1913 as if it had no history back of it. It was undoubtedly so-considered because its history had not been called to the attention of the Supreme Court but in the second mandamus suit, 136 Pac. (2nd) 270 the Supreme Court of Arizona goes back to the origin of said Chapter 1, Title 52, in the Act of Congress of August 25, 1890. If the court had then considered the full effect of the history of said act it probably would have reached a different conclusion. As matters now stand the Supreme Court of the state has gone back to the origin of Chapter 1, Title 52, to uphold the defendants' procedure but has not gone back to the origin of the act to determine whether it authorized the refunding.

e. The vital statute to be construed in this case is in truth an act of Congress for it originated as such and its construction relates back to its origin.

III

The Mandamus Proceedings in the State Court in Which No Bondholders Were Parties Is Not An Adjudication of the Rights of the Bondholders So As to Bar Them From Proceeding to Have Their Rights Determined in the Federal Court.

Hale v. Bimco Trading Company, 306 U. S.

375, 83 L. ed. 771, 59 Sup. Ct. Rep. 526,

Postal Telegraph Cable Co. v. Newport, 247 U. S. 464, 476, 62 Law ed. 1215, 38 Sup. Ct. Rep. 566,

Christopher v. Brusselback, 302 U. S. 500, 82 L. ed. 388, 391, 58 Sup. Ct. Rep. 350,
City of Clinton v. First National Bank, 39 Federal Supp. 907, 918.

The fact that certain counsel were permitted to file briefs as *amici curiae* did not make the judgment binding on all of the bondholders as according to recognized practice filing a brief as *amicus curiae* does not have any such effect for such *amicus curiae* has no control over the case.

Litchfield v. Crane, 123 U. S. 549, 31 Law ed. 199, 8 Sup. Ct. Rep. 210,

Stryker v. Crane, 123 U. S. 527, 540, 31 Law ed. 194, 8 Sup. Ct. Rep. 203,

Gratiot State Bank v. Johnson, 249 U. S. 246, 249, 63 Law ed. 587, 39 Sup. Ct. Rep. 263,
3 Cor. Jur. Sec. pages 1046-1052,

2 Amer. Jur. pages 679-682,

Dodd v. Reese, 24 N. E. (2nd) 995,

While there is a class of cases in which a number of a numerous class before the court may be held to represent the whole class so that the judgment will

bind all the members of the class, the rule is limited to such circumstances as assure a full presentation of the interests of all who are bound. Holding a person bound by a judgment entered in a case in which he has had no opportunity to be heard, deprives him of his property without due process of law.

Hansberry v. Lee, 85 L. ed. 22, 311 U. S. 32,
61 Supt. Ct. Rep. 115, 132 A.L.R. 741.

In this case there is no showing that the *Amici curiae* represented any bondholders except the statement in one brief that one was represented. Such an informal statement could certainly not bind all bondholders as a class nor any except that one. We think it could not bind that one as he had no control over the case.

The facts disclosed in this case make out a case of what would be considered sharp practice if the case were between individuals. We do not think that the fact that one of the parties is a subdivision of a state ought to permit the application of a lower standard.

Palmcroft Development Co. v. Phoenix, 46 Ariz.
200, 212, 49 Pac. (2nd) 626.

The public interests weigh heavily on the plaintiffs' side. Maricopa is a large and prosperous county. Its negotiable bonds have been widely distributed on the open market. Permanent school funds, insurance reserve funds, charitable trusts, trusts for minors and the incompetent, workmen's compensation funds, labor union reserves, as well as numerous small investors are

among the holders of these bonds. The two plaintiffs in this case represent investments made for the permanent funds of a state and the reserve fund of a life insurance company. Many others equally deserving are interested although not represented in this case. The defendant, Maricopa County, is not struggling to prevent insolvency. It desires to have these bonds refunded by the state loan commissioners merely to save some money, which it is able to pay.

It insists that its rights must be determined by the courts of its own state. We think it is entitled to the decision of an impartial rather than a favorably disposed tribunal.

The minority of the Supreme Court of the United States in *Wood v. Lovette*, 85 L. ed. 1404, 1408, 313 U. S. 362, 61 Supreme Court Reporter 983 thought that social considerations should enter into cases of this kind to the extent of permitting the legislature to throw its weight in favor of noncommercial litigants. The majority did not agree. In this case it makes no difference whether we accept the majority or minority view. The plaintiffs are entitled to prevail on a strictly impartial basis. The legislature has declared in favor of limiting refunding to callable bonds Chap. 39 Session L. 1927, Chaps. 74, 75 Session L. 1935) and the money involved in the controversy will certainly tend for as much social betterment if it is collected by the plaintiffs as if it is retained by the defendants.

We respectfully submit that the case must be considered by the Federal Courts on its merits and upon

such consideration judgment must be entered in favor of plaintiffs.

Respectfull submitted,

SMITH TROY, Attorney General of
the State of Washington,

By
John Spiller, Assistant Attorney Gen-
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I

APPENDIX

Exhibit A

Congressional Record, Vol. 21, Part 3, page 2275,
House of Representatives:

“The Committee on Territories, to whom was referred the bill (H. R. 3365) approving with amendments the funding act of the Territory of Arizona, having considered the same, report as follows:

The assessed valuation of the Territory of Arizona is, in round numbers, \$30,000,000, and the indebtedness of the Territory, counties, cities, and school districts, about \$3,000,000, or 10 per cent of the assessed valuation.

The rate of interest on the present indebtedness is not less than 6 per cent, and much of it is 10 per cent per annum, the average being about 8 per cent.

This high rate of interest has been paid regularly, and all the bonds, Territorial, county, city and school, are held at or above par, and they were all issued for indebtedness created prior to the Harrison act. At the time said act went into effect the Territorial and county treasuries were without funds, and continued without funds until the next taxes were paid. In order to carry on government it became a necessity to create debt, and this debt was placed in the form of warrants bearing 10 per cent interest. Notwithstanding the high rate of interest these warrants have never had a good commercial standing, on account of their dubious legal status. It is therefore a fact that the running expenses of the Territory, including counties,

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cities, and school districts, are largely increased by the depreciated value of warrants and the high rate of interest they bear. The Territory and many of the counties have each year fallen a little behind the preceding year in meeting their expenses, and it is therefore an absolute necessity to afford them relief.

The committee believe that a Territorial bond, with the long time proposed and having the approval of Congress, can be sold at par, bearing a less rate of interest than can be sold in any other way, and thereby secure for the Territory the much-needed relief and the saving of \$100,000 annually.

The provisions of the bill for carrying the same into effect have been carefully considered by the committee and are found to be ample, and that, except to legalize the indebtedness, there is no responsibility attached to the United States.

The time within which indebtedness may be funded is placed at December 31, 1890, when the taxes are due and payable. From and after that date there will be cash on hand with which to meet the current expenses of the Territory.

The committee are unanimously of opinion that the Territory of Arizona is entitled to relief, and therefore report back the accompanying bill with amendment, and recommend that it do pass."

III

Exhibit B

CONGRESSIONAL RECORD—HOUSE

(July 20, 1894, page 7754)

FUNDING ACT OF ARIZONA

MR. CULBERSON. Mr. Speaker, I call up the bill (H. R. 6754) to amend section 15 of an act approving, with amendments, the funding act of Arizona, approved June 25, 1890.

The bill was read, as follows:

BE IT ENACTED, etc. That an act entitled "An act approving, with amendments, the funding act of Arizona," approved June 25, 1890, and paragraph 2052 (section 15) of said act, be, and the same is hereby amended by adding thereto as follows:

"Provided further, however, That the present outstanding warrants, certificates, and other evidences of indebtedness issued subsequent to December 31, 1890, for the necessary and current expenses of carrying on the Territorial government only, together with such warrants as may be issued for such purpose for the years ending December 31, 1894, and December 31, 1895, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates, or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the Harrison Act."

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Sec. 2. That all acts or parts of acts in conflict with this act are hereby repealed.

MR. CULBERSON. I yield to the gentleman from Arizona.

MR. SMITH of Arizona. Mr. Speaker, this is simply a bill carrying to a further extent the funding act of Arizona, so as to prevent the payment of 10 per cent on outstanding warrants for the current expenses of the Territory. It is desired to fund them under the funding act until the collection of the taxes, so as to be able to start on a cash basis. This is purely a local matter extending our funding act, and the bill is unanimously reported from the Committee on the Judiciary.

MR. HUNTER. I see that it provides for extending the time up to 1895.

MR. SMITH of Arizona. Yes. That is, until the collection of taxes.

MR. HUNTER. But if the Territory should become a State in the meantime would not that have some effect on the provisions of this bill?

MR. SMITH of Arizona. It would not have any effect, for the debt would be bonded as it arose, and the limitation placed by the Territorial Legislature, which does not meet until February, 1895. The Legislature can provide then for everything that happens thereafter, and this is intended only to fix the time up to the meeting of the Territorial Legislature.

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The bill was ordered to be engrossed and read a third time; and being engrossed, it was accordingly read the third time, and passed.

On motion of Mr. CULBERSON, a motion to reconsider the vote by which the bill was passed was laid on the table.

Exhibit C

CONGRESSIONAL RECORD—SENATE

(May 23, 1896, pages 5625 and 5626)

MR. PERKINS. I ask unanimous consent to call up the bill (S. 3161) amending and extending the provisions of an act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 25, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill.

MR. COCKRELL. When was that bill reported?

MR. WHITE. A very short time ago, I think.

MR. PERKINS. It was reported from the Committee on Territories yesterday.

MR. COCKRELL. The report has not been laid on my table.

MR. PERKINS. The report is printed, and the Secretary will read it for the Senator's information.

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MR. COCKRELL. I can understand much better when I have the report myself. Does the report explain the bill?

MR. PERKINS: I so understand. I will say that I introduced the measure more especially at the request of the Delegate from Arizona, and it is to correct some informality. The committee examined it very carefully, and from those who have stated the matter to me I learn it is a very proper measure.

MR. COCKRELL. Let the report be read.

THE VICE-PRESIDENT. The report will be read.

The Secretary read the following report, submitted by Mr. Davis May 22, 1896:

The Committee on Territories, to whom was referred Senate Bill 3161, having considered the same, hereby adopt House Report No. 1931 in support to a bill identical in tenor, and recommend the passage of Senate Bill aforesaid.

(House Report No. 1931, Fifty-fourth Congress,
first session.)

The Committee on the Territories, to whom was referred House bill 8885, beg leave to submit the following report:

The act of Congress entitled "An act approving, with amendments, the funding act of Arizona" became a law June 25, 1890, and authorized the fund-

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ing of all Territorial, county, municipal, and school-district indebtedness of Arizona which had accrued and would accrue, with the interest thereon, until and including December 31, 1890, into 5 per cent bonds, and under the provisions of the act a loan commission, consisting of the governor, secretary of the Territory, and Territorial auditor, was created to fund indebtedness under the terms of the act.

The purpose of the law was to effect an annual saving in interest and place the Territory upon a cash basis. The floating indebtedness of the territory represented by warrants bore 10 per cent interest, and upon that indebtedness an immediate saving was had of 5 per cent. The average rate of interest on the bonded indebtedness of the Territory was 8 per cent, and the operation of the law effected a saving of 3 per cent upon all indebtedness funded. Only such bonded indebtedness could be funded as had matured or was voluntarily surrendered by the holders thereof.

A supplemental act of Congress was passed and approved August 3, 1894, extending the time for funding outstanding warrants for Territorial expenses only until December 31, 1895. The object of the present bill is to further extend the provisions of the funding act approved June 25, 1890, until January 1, 1897, so as to permit and authorize the funding of such outstanding indebtedness as might have been funded under the original act had the same been surrendered before the act had lapsed.

It is not proposed to fund any indebtedness which

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could not have been funded under the original act had said indebtedness been presented in time.

No new indebtedness is proposed to be funded in excess of the limit prescribed by law. In authorizing the funding of the outstanding liabilities the act also validifies the indebtedness already funded and authorized to be funded, so as to prevent the possibility of repudiation of bona fide obligations.

The eighteenth legislature of Arizona unanimously memorialized Congress to validate securities about which doubt existed.

Upon investigation the committee believe the legislation beneficial and wise and in the interest of good government, and therefore recommend the passage of the bill.

The bill was reported to the Senate without amendment, ordered to be engrossed for a third reading, read the third time, and passed.

Exhibit D

CONGRESSIONAL RECORD—HOUSE

(June 1, 1896, page 5968)

ARIZONA FUNDING ACT

MR. MURPHY of Arizona. Mr. Speaker, I move to suspend the rules and pass the Senate bill which I send to the desk.

The bill was read, as follows:

BE IT ENACTED, etc., That the provisions of

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the acts of Congress approved June 25, 1890, and August 3, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June 25, 1890, until January 1, 1897, and all outstanding bonds, warrants, and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June 25, 1890, and which said bonds, warrants, and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded, with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this act.

Sec. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress approved June 25, 1890, and the act amendatory thereof and supplemental thereto approved August 3, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded, and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved, and validated, and may be funded as in this act pro-

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vided until January 1, 1897; Provided, That nothing in this act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed, and made valid, and authorized to be funded.

The SPEAKER pro tempore. Is a second demanded?

MR. HEPBURN. I demand a second.

MR. MURPHY of Arizona. I ask unanimous consent that a second be considered as ordered.

MR. KEM. I object.

Tellers being ordered upon the question of ordering a second, the House divided; and the tellers reported—ayes 80, noes 1.

So a second was ordered.

MR. MURPHY of Arizona. Now, Mr. Speaker, I ask that the report upon this bill be read. It is a unanimous report and explains the object of the bill clearly.

The report (by Mr. Harris) was read, as follows:

The Committee on the Territories, to whom was referred House bill 8885, beg leave to submit the following report:

The act of Congress entitled “An act approving,

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with amendments, the funding act of Arizona" became a law June 25, 1890, and authorized the funding of all Territorial, county, municipal, and school district indebtedness of Arizona which had accrued and would accrue, with the interest thereon, until and including December 31, 1890, into 5 per cent bonds, and under the provisions of the act a loan commission, consisting of the governor, secretary of the Territory, and Territorial auditor, was created to fund indebtedness under the terms of the act.

The purpose of the law was to effect an annual saving in interest and place the Territory upon a cash basis. The floating indebtedness of the Territory represented by warrants bore 10 per cent interest, and upon that indebtedness an immediate saving was had of 5 per cent. The average rate of interest on the bonded indebtedness of the Territory was 8 per cent, and the operation of the law effected a saving of 3 per cent upon all indebtedness funded. Only such bonded indebtedness could be funded as had matured or was voluntarily surrendered by the holders thereof.

A supplemental act of Congress was passed and approved August 3, 1894, extending the time for funding outstanding warrants for Territorial expenses only until December 31, 1895. The object of the present bill is to further extend the provisions of the funding act approved June 25, 1890, until January 1, 1897, so as to permit and authorize the funding of such outstanding indebtedness as might have been funded under the original act had the same been surrendered before the act had lapsed.

It is not proposed to fund any indebtedness which

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could not have been funded under the original act had said indebtedness been presented in time.

No new indebtedness is proposed to be funded in excess of the limit prescribed by law. In authorizing the funding of the outstanding liabilities the act also validifies the indebtedness already funded and authorized to be funded, so as to prevent the possibility of repudiation of bona fide obligations.

The eighteenth legislature of Arizona unanimously memorialized Congress to validate securities about which doubt existed.

Upon investigation the committee believes the legislation beneficial and wise and in the interest of good government, and therefore recommend the passage of the bill.

MR. MURPHY of Arizona. I reserve the balance of my time, unless some gentleman desires to ask questions.

MR. HOPKINS. Mr. Speaker, I think it is quite important that the gentleman should explain the provisions of this bill somewhat.

MR. MURPHY of Arizona. I supposed that the report explained it sufficiently, but if the gentleman thinks it does not I will gladly supplement it with a brief explanation. Under the working of the act of Congress approved June 25, 1890, the Territory of Arizona was authorized to fund all its indebtedness of whatever nature into 5 per cent bonds, thereby effecting an average saving of 3 per cent upon its

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indebtedness. That law applied to all kinds of indebtedness—school district, Territorial, county, and municipal.

A commission was organized under the act, consisting of the governor, the secretary, and the Territorial auditor, for the purpose of executing the law, but of course the outstanding indebtedness bearing a higher rate of interest could not be compelled to be surrendered or funded unless it had matured, and therefore there still remained a considerable portion which could not be funded. Many obligations were about to mature, and they were funded. A portion of the 8 per cent indebtedness was funded, but some of the higher interest-bearing bonds of counties and municipalities were refused to be surrendered for funding. The expectation was to put the Territory upon a cash basis, but that expectation was disappointed, and the members of the Territorial government came here and asked the last Congress to extend the funding act for a year longer, covering the floating indebtedness and the Territorial expenses only, but not including the outstanding indebtedness of municipalities bearing a higher rate of interest. That act was passed August 3, 1894.

A question was raised here this morning about a cloud being on Territorial bonds, and a bill was passed validating certain bonds of New Mexico. A large amount of the bonds of Arizona might possibly give rise to the same questions if our people desired to repudiate their obligations, but there is no such desire on their part, and the Territorial legislatures, recognizing the danger to the credit of the Territory

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if anyone should undertake to litigate these securities, have unanimously memorialized Congress to pass this act to validate both the bonds which have been funded and others outstanding, bearing a higher rate of interest, upon their voluntary surrender by their holders. There is about \$200,000 involved altogether. I will ask the Clerk to read the memorial of the legislature, if the gentleman desires.

MR. HOPKINS. That is not necessary.

MR. JOHNSON of North Dakota. I wish to ask the gentleman whether there is anything in the act of 1890 safeguarding these bonds against being sold for less than par?

MR. MURPHY of Arizona. Yes, sir; they can not be so sold.

MR. JOHNSON of North Dakota. I do not see any provision of that kind in the bill.

MR. MURPHY of Arizona. Well, this bill refers to the provisions of the other act, which prohibits the selling of the bonds for less than par.

MR. JOHNSON of North Dakota. What arrangement is there for securing a premium on the bonds, provided the market should warrant it?

MR. MURPHY of Arizona. The Territorial officers constituting the loan commission are required, under the provisions of the act, to advertise for bids.

MR. JOHNSON of North Dakota. What experi-

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ence have you had on that subject since the act of 1890?

MR. MURPHY of Arizona. Bonds to the amount of \$500,000 were sold at a premium, bringing 102.

MR. JOHNSON of North Dakota. The bonds, as I understand, which were sold under the act of 1894 were gold bonds; that is, the interest was payable in gold.

MR. MURPHY of Arizona. Yes, sir; and the principal in lawful money.

MR. JOHNSON of North Dakota. And the same requirement applies with regard to these bonds?

MR. MURPHY of Arizona. Yes, sir.

MR. McCORMICK. Will this issue of bonds cover the entire indebtedness of the Territory?

MR. MURPHY of Arizona. Yes, sir; the entire indebtedness of the Territory may be funded under this act.

MR. JOHNSON of North Dakota. Will this bill, if it becomes a law, have the effect of validating any bonds which are now questionable?

MR. MURPHY of Arizona. Yes, sir; to a certain degree. None of the bonds have been repudiated by the Territory, but there is a cloud to a certain extent resting upon some of them.

MR. HEPBURN. This indebtedness, or the

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larger part of it, was incurred, I believe, while a statute of the United States forbidding the Territory from issuing bonds was in force?

MR. MURPHY of Arizona. Oh, no; only a very small portion of it—about \$200,000.

MR. HEPBURN. What is the total amount that has been funded or may be funded under this act—the total amount of the indebtedness of the Territory?

MR. MURPHY of Arizona. Probably less than \$2,000,000. I funded \$1,600,000 while I was governor. The aggregate I have named covers not simply debts of the Territory proper, but indebtedness of cities, counties, townships, and school districts. No one would call the debt of New York City the debt of New York. The amount of indebtednesses I have named includes every kind of obligation of the Territory proper and the indebtedness of municipalities, school districts, etc.; and the funding of this debt will save us on the average 3 per cent interest.

MR. HEPBURN. What portion of the \$2,000,000 of indebtedness has been or will be incurred in the refunding of bonds of the prohibited class of which we have been speaking?

MR. HILBORN. The Pima claims?

MR. MURPHY of Arizona. None of the Pima claims; but of obligations similar to those, about \$200,000.

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MR. HEPBURN. I am willing to yield the floor to any gentleman who wants to speak on this subject. (Cries of "Vote!" "Vote!")

The question was taken; and the motion to suspend the rules and pass the bill was agreed to, two-thirds voting in favor thereof.

Exhibit E

Act 9, page 38, Session Laws of 1897, approved March 8, 1897, authorized the issuance of \$100,000.00 of territorial bonds for the erection of the capitol building, such bonds to be payable absolutely in fifty years from their date, the territory to have the right to pay them at any time after twenty years from their date.

Act 47, approved March 19, 1903, page 75, Session Laws of 1903, authorized the issuance of bonds to provide for improvements and publications of the Agricultural Experiment Station of the University and establishing farmers' institutes and short courses. The bonds were made payable within twenty years from the date of their issuance. This act provided for a sinking fund, and further provided that whenever, "after the expiration of ten years from the issuance of any bonds under this act there remains, after the payment of the interest as provided in this section, a surplus of \$1,000.00 or more, it shall be the duty of the territorial treasurer to advertise" for the retirement of the bonds. Clearly, these bonds were authorized to be optional for the period between ten and twenty years after their date of issuance.

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Act 73, approved March 19, 1903, page 127 Session Laws of 1903, authorized the issuance of \$100,000.00 of bonds for the purpose of making improvements to the territorial asylum. These bonds were required to be payable fifty years after date. A sinking fund was provided for and Section 8 of said act contained the following provisions:

“Whenever, after the expiration of twenty-five years from the date of issuance of any bond under this act there shall be in the sinking fund for the redemption of the bonds for the territorial asylum for the insane, the sum of \$2,500.00 or more, it shall be the duty of the territorial treasurer to advertise,” for the retirement of said bonds. Clearly, these bonds were optional during the period between twenty-five years and fifty years after their date of issuance.

In 1905, the legislature authorized Apache County to raise money for the purpose of building a court house, in the amount of \$15,000.00, payable thirty years from the date of issuance, providing a sinking fund beginning with the year 1925, which should be sufficient each year after that date to pay \$1500.00 upon the principal of said bonds. Chapter 6, page 5, Session Laws of 1905.

Likewise, in the year 1905, the legislature passed an act authorizing Gila County to issue \$40,000.00 of bonds for court house and jail, payable in thirty years, with an option on the part of the county to pay any or all of them after ten years after the date of their issuance. Chapter 9, page 12, Session Laws of 1905.

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Likewise, in 1905, the legislature passed an act authorizing Mohave County to issue \$20,000.00 bonds for the purpose of building a court house, said bonds to be payable thirty years from the date of their issuance, and providing for a sinking fund beginning in the year 1925, and that each year thereafter a tax of \$2000.00 per year should be levied to retire said bonds. Chapter 57, page 112, Session Laws of 1905.

Likewise, in 1905, the legislature passed an act providing for the issuance of \$19,000.00 of bonds for the repair of the territorial bridge across the Gila, at Florence, said bonds to be payable at the end of fifty years and to be optional twenty-five years after their issuance. Chapter 58, page 117, Session Laws of 1905.

Likewise, in 1905, the legislature passed an act for the issuance of \$40,000.00 bonds for additional buildings and equipment at the territorial prison, said bonds to be payable fifty years after date and to be redeemable after twenty-five years from the date of issuance. Chapter 60, page 124, Session Laws of 1905.

Likewise, in 1905, the legislature passed an act authorizing the county of Mohave to issue bonds for \$10,000.00 for the construction and furnishing of a jail, said bonds to be payable in twenty years, with an option on the part of the county to pay any or all of them after ten years from the date of issuance.

Act 61, page 129, Session Laws of 1905.

In 1907, the legislature passed an act authoriz-

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ing Gila County to issue \$25,000.00 bonds for the completion of the court house and jail, said bonds to be payable in twenty years, with option on the part of the county to pay any or all of them after eight years from the date of their issuance.

Chapter 17, page 16, Session Laws, 1907.

In 1909, the legislature passed an act authorizing Mohave County to issue bonds for building a court house in the amount of \$30,000.00, payable thirty years after date, and providing for a sinking fund, and that in the year 1929 and each year thereafter until the year 1939, the county should levy and collect a tax sufficient to pay \$3,000.00 upon the principal of said bonds, and when the sum of \$5,000.00 should be in the redemption fund the same should be used for the redemption of said bonds. Chapter 17, page 34, Sessions Laws of 1909.

Exhibit F

Title 52

Chapter I

Funding and Refunding

5251. For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the State of Arizona, or of the Territory of Arizona assumed by the State of Arizona, and such future indebtedness as may be or is now authorized by law, the governor of the said state, together with the state auditor and state treasurer,

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and their successors in office shall constitute a board of commissioners, to be styled the Loan Commissioners of the State of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

Marginal Notations: Loan Commissioners, Ch. 29, Sec. 1, Laws 1912, 1st Sp. Sess.

5252. It shall be and is hereby declared the duty of the said loan commissioners to provide for the payment of the existing state indebtedness due, and to become due, or that is now or may hereafter be authorized by law; and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest of the existing and subsisting state legal indebtedness, and also that which may at any time become due, or is now or may be hereafter authorized by law, the said commissioners shall, from time to time, issue negotiable coupon bonds of this state when the same can be issued at a lower rate of interest than previously paid on state indebtedness and to the profit and benefit of the state.
sioner. Sec. 2, id.

5253. Said bonds shall be issued as nearly as practicable in denominations of one thousand dollars, but bonds of a lower denomination, of not less than one hundred dollars may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners but in no case to exceed five per centum per annum, which interest shall be paid in gold coin or its equivalent in lawful money of the United States, on the 15th day of January and

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July in each year, at the office of the state treasurer or some bank or trust company in the City of New York at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States within twenty-five years after date of their issue. The state reserves the right to redeem at par any of said bonds in their numerical order at any time after fifteen years after the date thereof. They shall bear the date of their issue, state when, where, and to whom payable; rate of interest, and when and where such interest is payable; shall be signed by said loan commissioners; shall have the seal of the state affixed thereto; shall be countersigned by the state treasurer and bear his official seal, and shall be registered by the state auditor in a book to be kept by him for that purpose, which record shall show amount sold for, or if exchanged, for what exchanged; and the faith and credit of the state is hereby pledged for the payment of said bonds and the interest accruing thereon as herein provided.

Marginal Notations: Issuance of refunding bonds, Sec. 3, id., Am. Ch. 2, Laws 1913, 2nd Sp. Sess.

5254. Coupons for the interest shall be attached to each bond, so that they may be removed without injury to, or mutilation of such bond.

They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the state treasurer.

The said coupons shall cover the interest ex-

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pressed in said bond from the date of issue until paid; but in no case shall bonds bear interest, nor shall interest be paid thereon for any time before their delivery to the purchaser, as hereinafter provided.

Marginal Notations: Interest coupons, Sec. 4, id., Ch. 29, Laws 1912, 1st Sp. Sess.

5255. Whenever the said loan commissioners may be authorized by law to issue bonds, or shall have decided to refund or redeem all or any part of the existing indebtedness of this state they shall direct the state treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published once a week for the period of one month in three newspapers published in the state, no two of which shall be published in the same county, and they may further direct the state treasurer, if in their opinion such action is desirable, to advertise as hereinbefore mentioned by at least one insertion in a publication published in the City of New York, in the State of New York, and in one in the City of San Francisco, in the State of California; such notice shall specify the amount of bonds to be sold, the place, day, and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said publication; and at the place and time named in said notice the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof, to the bidder or bidders making the best offer therefor; provided, that said loan commissioners shall have the right to reject any and all bids; and provided, further, that they may refuse to make any award unless sufficient security

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shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

Marginal Notation: Sale of bonds, Sec. 5, id.

5256. When the sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds, and any expense incurred by them therefor, for the publication of said notices, cost of remitting funds for the payment of interest or money on said bonds, and all necessary incidental expenses shall be paid out of the general fund of the state, upon the order of the state auditor, countersigned by the governor; and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

They shall, from time to time after signing said bonds, deliver the same to the state Treasurer, taking his receipt therefor, and charge him therewith.

Marginal Notation: Cost of sale, Sec. 6, id.

5257. The state treasurer shall sell said bonds for cash, or exchange them for any of the indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any indebtedness be redeemed at more than its face value and any interest that may be due thereon.

The treasurer shall endorse by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds,

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the time when and the amount for which exchanged.

Marginal Notation: Sale or exchange of bonds, Sec. 7, id.

5258. Moneys received by the treasurer shall be applied by him to the redemption of the indebtedness for the redemption of which bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of state warrants, of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

Before any such indebtedness shall be paid, the state auditor shall endorse on each certificate the amount due thereon, and shall write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record thereof.

Marginal Notations: Application of proceeds, Sec. 8, id.

5259. There shall be levied annually upon the taxable property in this state, and in addition to the levy for other authorized taxes, a sufficient sum to pay the interest on all bonds issued and disposed of hereunder, to be placed in the state treasury, in the fund to be known as the "Interest Fund." And each year after such bonds shall have been issued such additional amount shall be levied annually as will pay four per cent of the total amount issued until all the bonds issued hereunder are paid and discharged.

The state board of equalization, or, on their failure,

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the state auditor, shall determine the rate of tax to be levied in the different counties in the state to carry out the provisions of this section, and shall certify the same to the board of supervisors, in each county and to the municipal or school authorities; and the said board of supervisors, or authorities, are hereby directed and required to enter such rate on their assessment rolls in the same manner and with the same effect as is provided by law in relation to other state, county, municipal, and school taxes. Every tax levied under the provisions or authority of this section shall be a lien against the property assessed.

All moneys derived from taxes authorized by this section shall be paid into the state treasury, and shall be applied:

First. To the payment of the interest on the bonds issued hereunder.

Second. To the payment of the principal of such bonds;

Provided, that all moneys remaining in the interest fund after the payment of the interest and all moneys remaining in the "redemption fund" after all of said bonds shall have been paid and discharged, shall be transferred by the state treasurer to the state "general fund".

Marginal Notations: Tax levy, Sec. 9, id.

5260. Whenever, after the expiration of the fifteen years from the date of issuance of any bonds under this chapter, there remains after the payment

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of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the state treasurer to advertise, as in the manner of advertising by the loan commissioners for bids for sale of bonds, which advertisement shall state the amount of moneys in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which said fund is set apart to pay and discharge; and if such bonds so numbered in such advertisements shall not be presented for payment and cancellation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the state auditor, who shall endorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The state auditor shall keep a record of all bonds issued and disposed of by the state treasurer, showing their number, rate of interest, date and amount of sale, when, where, and to whom, payable, and if exchanged, for what, and when presented for redemption the date, amount due thereon, and person surrendering. The boards of supervisors of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the state their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan

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commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other state indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law, to said county, municipality, or school district upon official demand by said authorities. The county, municipality, or school district shall pay into the state treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the state board of equalization, or on their failure by the state auditor, to be levied for the payment of the principal of such bonds issued in redemption, or refunding, or of other bonds issued to such county, municipality, or school district, as herein provided, in the same manner as is herein provided for the payment of the principal and interest of state indebtedness, and, in addition, the interest paid by the state on such bonds.

Marginal Notation: Redemption of bonds, Sec. 10, id.

5261. When the treasurer pays or redeems any indebtedness he shall endorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words "redeemed and cancelled" with the date of cancellation. He shall keep a full and particular account and record of all his proceedings of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings with his annual report, to be by the governor laid before the legislature at its

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meeting. All books and papers pertaining to the issuance and payment of bonds and interest thereon shall at all times be open to the inspection of the party interested, or to the governor, or committee of either branch of the legislature, or a joint committee of both.

Marginal Notation: Cancellation of redeemed bonds, Sec. 11, id.

5262. It shall be the duty of the state treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund; provided, that the state auditor shall first draw his warrant on the state treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund.

Marginal Notations Payment of interest, Sec. 12, id.

5263. It shall be the duty of said loan commissioners to make a full report of all their proceedings to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the State legislature.

Marginal Notation: Report of loan commissioners, Sec. 13, id.

5264. No bond issued under the provisions of this chapter shall be taxed within this state.

Marginal Notation: Bonds not taxable, Sec. 14, id.

5265. Whenever the owner of any coupon bond

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issued pursuant to the provisions of this chapter shall present such bond to the state auditor with a request for the conversion of such bond into a registered bond, the state auditor shall cut off and cancel the coupons of any such coupon bond so presented and shall stamp, print or write upon such bond so presented, either upon the back or the face thereof, as may be convenient, a statement to the effect that the said bond is registered in the name of the owner and that, thereafter, the interest and principal of said bond are payable to the registered owner. Thereafter and from time to time, any such bond may be transferred by such registered owner in person or by attorney duly authorized, on presentation of such bond to the state auditor and the bond again registered as before, a similar statement being stamped, printed or written upon any such bond may be substantially in the following form:

(Date: giving month, year and day.)

This bond is registered pursuant to the statutes in such case made and provided in the name of
....., and the interest and principal thereof are hereafter payable to such owner.

.....
State Auditor.

If any bond shall have been registered as aforesaid, the principal and interest of such bond shall be payable to the registered owner. The state auditor shall enter in the register of said bonds kept by him pursuant to the provisions of this chapter, or in a separate book, the fact of the registration of such bond

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and in whose name respectively, so that said register or book shall at all times show what bonds are registered and the name of the registered owner thereof.

Marginal Notation: Registration of bonds, Ch. 50, Laws 1913, 2nd Sp. Sess.

Exhibit G

(Chap. 614, 51st Cong. 1st Sess., June 25, 1890.)

BE IT ENACTED, etc., That the act of the Revised Statutes of Arizona of eighteen hundred and eighty-seven, known as "Title XXXI—Funding," be and is hereby, amended so as to read as follows, and that as amended the same is hereby approved and confirmed, subject to future territorial legislation:

Marginal Notation: Arizona funding act amended and approved.

TITLE XXXI—FUNDING AND LOAN

Chapter One

"Territorial, County, Municipal, and School District Indebtedness.

"Par. 2039. (Sec. 1) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the territory of Arizona and such future indebtedness as may be or is now authorized by law, the governor of the said territory together with the territorial auditor and territorial secretary, and their successors in office, shall cons-

stitute a board of commissioners, to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

Marginal Notation: Board of loan commissioners constituted.

“Par. 2040. (Sec. 2.) It shall be, and is hereby, declared the duty of the loan commissioners to provide for the payment of the existing territorial indebtedness due, and to become due, or that is now, or may be hereafter, authorized by law and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest, or either of the existing and subsisting territorial legal indebtedness, and also that which may at any time become due, or is now or may be hereafter authorized by law, the said commissioners shall, from time to time, issue negotiable coupon bonds of this territory when the same can be done at a lower rate of interest and to the profit and benefit of the territory.

Marginal Notations: Duty of loan commissioners
Issue of negotiable coupon bonds.

“Par. 2041. (Sec. 3.) Said bonds shall be issued as near as practicable in denominations of one thousand dollars, but bonds of a lower denomination, not less than two hundred and fifty dollars, may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners, but in no case to exceed five per centum per annum, which interest shall be paid in gold coin, or its equivalent in

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lawful money of the United States, on the fifteenth day of January in each year, at the office of the territorial treasurer, or at such bank in the city of New York, in the state of New York, or in the city of San Francisco, in the State of California, or such place as may be designated by said loan commissioners, at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States fifty years after the date of their issue. Said territory reserves the right to redeem at par any of said bonds, in their numerical order, at any time after twenty years after the date thereof.

Marginal Notations: Denominations of bonds. Interest. Maximum. Where payable, etc. Payment of principal. Reserved rights of redemption.

“They shall bear the date of their issue, state when, where, and to whom payable, rate of interest, and when and where payable, and shall be signed by said loan commissioners, and shall have the seal of the territory affixed thereto, and countersigned by the territorial treasurer, and bear his official seal, and shall be registered by the territorial auditor in a book to be kept by him for the purpose, which shall state amount sold for, or, if exchanged, for what; and the faith and credit of the territory is hereby pledged for the payment of said bonds and the interest accruing thereon, as herein provided.

Marginal Notations: Form of bonds. Signed, etc. Sealed. Registered. Pledge of payment.

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“Par. 2042. (Sec. 4.) Coupons for the interest shall be attached to each bond, so that they may be removed without injury to or mutilation of bond. *Marginal Notation*: Interest Coupons.

They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the territorial treasurer.

Marginal Notation: Consecutive number, etc.

“The said coupons shall cover the interest expressed in said bond from the date of issue until paid; but in no case shall bonds bear interest, nor shall any interest be paid thereon for any time before their delivery to the purchaser, as hereinafter provided.

Marginal Notation: Interest. Limitation.

“Par. 2043. (Sec. 5.) Whenever the said loan commissioners may be authorized by law to issue bonds, or shall have decided to refund or redeem all or any part of the existing indebtedness of this territory, they shall direct the territorial treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published for the period of one month in some daily newspaper published at the capital of the territory, and at least one insertion in a newspaper published in the city of New York, in the state of New York, and in the City of San Francisco, in the state of California; such notice shall specify the amount of bonds to be sold, the place, day, and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said

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publication; and at the place and time named in said notice, the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof to the bidder or bidders therefor bidding the lowest rate of interest: Provided, That said loan commissioners shall have the right to reject any and all bids: And provided further, That they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

Marginal Notations: Issue and redemption, etc., of bonds. Advertisement of sale. Bids. Award to lowest bidder. Provisos. Rejection of bids. Security.

“Par. 2044. (Sec. 6.) When the sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds as in this act provided, and any expense incurred by them therefor, for the publication of said notices, costs of remitting funds for the payment of interest or money on said bonds, and all other necessary incidental expenses under the provisions of this act, shall be paid out of the general fund of said territory, upon the order of the territorial auditor, countersigned by the governor; and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

Marginal Notations: Loan commissioners to procure bids. Payment of expenses, etc. Appropriation.

“They shall, from time to time after signing said bonds, deliver them to the territorial treasurer, tak-

ing his receipt therefor, and charge him therewith. The said treasurer shall give to the Territory of Arizona an additional official bond, with two or more sureties, in a sum equal to the amount of bonds delivered to him by the said loan commissioners, which bond shall be approved by the governor and deposited and filed with the secretary of the territory and recorded by him in a book to be kept for that purpose. and the said treasurer shall stand charged upon his official bond for the faithful performance of the duties required of him under this act.

Marginal Notation: Delivery of bonds. Additional bond of treasurer.

“Par. 2045. (Sec. 7.) The territorial treasurer shall sell said bonds for cash, or exchange them for any of the indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any indebtedness be redeemed at more than its face value and any interest that may be due thereon.

Marginal Notations: Sale or exchange of bonds. Limitations.

“That said treasurer shall endorse by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

Marginal Notation: Indorsement by treasurer.

“Par. 2046 (Sec. 8.) Moneys received by said

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treasurer shall be applied by him to the redemption of the indebtedness for the redemption of which bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of territorial warrants, of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

Marginal Notation: Application of moneys received. Notice of redemption. Cessation of interest.

Before any such indebtedness shall be paid the territorial auditor shall indorse on each certificate the amount due thereon, and shall write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record thereof.

Marginal Notation: Indorsement by auditor. Record.

“Par. 2047. (Sec. 9.) There shall be levied annually upon the taxable property in this territory, and in addition to the levy for other authorized taxes, a sufficient sum to pay the interest on all bonds issued and disposed of in pursuance of the provisions of this act, to be placed in the territorial treasury, in the fund to be known as the ‘Interest Fund’. And fifty years after such bonds shall have been issued such additional amount shall be levied annually as will pay ten per cent of the total amount issued until all the bonds issued under the provisions of this act are paid and discharged. Nothing herein contained shall be construed to prevent the legislature of Ari-

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zona from creating a sinking fund during the life of said bonds for their redemption at maturity.

Marginal Notations: Annual interest tax levy. "Interest fund." Additional ten per cent tax levy. Discharge of bonds. Sinking fund.

"The territorial board of equalization, or, on their failure, the territorial auditor, shall determine the rate of tax to be levied in the different counties in the territory to carry out the provisions of this act, and shall certify the same to the 'board of supervisors' in each county and to the municipal or school authorities; and the said board of supervisors, or authorities are hereby directed and required to enter such rate on their assessment rolls in the same manner and with the same effect as is provided by law in relation to other territorial, county, municipal and school taxes. Every tax levied under the provisions of authority of this act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such tax has been paid.

Marginal Notations: Determination of taxable rate. Certification and entry of taxable rate on assessment rolls. Tax becomes a lien on property.

"All moneys derived from taxes authorized by provisions of this act shall be paid into the territorial treasury, and shall be applied:

Marginal Notations: Tax moneys to go into treasury.

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“First. To the payment of the interest on the bonds issued hereunder.

Marginal Notation: Application of payments.

“Second. To the payment of the principal of such bonds: Provided, That all moneys remaining in the interest fund after the payment of the interest and all moneys remaining in the ‘redemption fund’ after all said bonds shall have been paid and discharged, shall be transferred by the territorial treasurer to the territorial ‘general fund.’

Marginal Notation: Proviso. Transfer of remaining moneys to “general fund.”

“Par. 2048. (Sec. 10.) Whenever, after the expiration of the fifty years from the date of issuance of any bonds under this act, there remains after the payment of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the territorial treasurer to advertise, as in the manner of advertising by the loan commissioners for bids, for sale of bonds, which advertisement shall state the amount of money in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which such fund is set apart to pay and discharge; and if such bonds so numbered in such advertisements shall not be presented for payment and cancellation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the ex-

piration of such publication. Before any such bonds shall be paid they shall be presented to the territorial auditor, who shall indorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The territorial auditor shall keep a record of all bonds issued and disposed of by the territorial treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom payable, and if exchanged, for what, and when presented for the redemption, the date, amount due thereon, and person surrendering.

Marginal Notations: Redemption surplusage. Treasurer to advertise for presentation of certain bonds for payment, etc. Cessation of interest after publication. Indorsement by auditor before payment. Auditor's bond record.

“The boards of supervisors of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the territory their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal, and school district indebtedness, upon the official demand of said authorities, in the same manner as other territorial indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law, to said county, municipality, or

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school district, upon official demand by said authorities; the county, municipality, or school district to pay into the territorial treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the territorial board of equalization, or on their failure by the territorial auditor to be levied for the payment of the principal of the bonds issued in redemption, refunding, or other bonds issued to such county, municipality, or school district when the same shall become due, and, in addition, a rate of interest paid by the territory on such bonds.

Marginal Notations: County, municipal, and school district indebtedness. Report to loan commissioners. Redemption or refunding of same, on demand, into territorial bonds. Additional principal and interest bond-tax levies.

“Par. 2049. (Sec. 11.) When the treasurer pays or redeems any indebtedness he shall indorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words ‘redeemed and cancelled’ with the date of cancellation. He shall keep a full and particular account and record of all his proceedings under the act and of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings under this act with his annual report, to be by the governor laid before the legislature at its meeting. All books and papers pertaining to the matter provided in this act shall at all times be open to the inspection of the party interested, or to the governor, or a committee of either branch of the legislature, or a joint committee of both.

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Marginal Notations: Cancellation upon payment of certificates, etc., by treasurer. Treasurer's bond record. Treasurer's annual report. Inspection of bond record, etc.

“Par. 2050. (Sec. 12.) It shall be the duty of the territorial treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund: Provided, That the territorial auditor shall first draw his warrant on the territorial treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund.

Marginal Notations: Payment of bond interest. Proviso. Deficiency.

“Par. 2051. (Sec. 13.) It shall be the duty of said loan commissioners to make a full report of all their proceedings had under the provisions of this act to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the territorial legislative assembly.

Marginal Notation: Loan commissioner's annual report.

“Par. 2052. (Sec. 14.) No bond issued under the provisions of this act shall be taxed within this territory.”

Marginal Notation: Exemption from taxation.

Sec. 15. That nothing in this act shall be construed to authorize any future increase of any indebtedness

XLIII

in excess of the limit prescribed by the "Harrison Act:" Provided, however, That the present existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on territorial, county, municipal, and school government for the year ending December thirty-first, eighteen hundred and ninety, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates, or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the Harrison Act."

Marginal Notations: Maximum limit of indebtedness. Proviso. Exceptions. Limitation thereafter.

That all acts or parts of acts in conflict with this act are hereby repealed.

Marginal Notation: Repeal.

Exhibit H

(Chap. 200, 53d Cong. 2d Sess., August 3, 1894.)
BE IT ENACTED, etc., That an act entitled "An act approving, with amendments, the funding act of Arizona," approved June twenty-fifth, eighteen hundred and ninety, and paragraph twenty hundred and fifty-two (section fifteen) of said act, be, and the same is hereby, amended by adding thereto as follows:

"PROVIDED further, however, That the present outstanding warrants, certificates, and other evidences of indebtedness issued subsequent to December thirty first, eighteen hundred and ninety, for the necessary

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and current expenses of carrying on the territorial government only, together with such warrants as may be issued for such purpose for the years ending December thirty-first, eighteen hundred and ninety-four, and December thirty-first, eighteen hundred and ninety-five, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the 'Harrison Act'."

Marginal Notation: Funding of debts for necessary expenses.

Sec. 2. That all acts or parts of acts in conflict with this act are hereby repealed.

Marginal Notation: Limitation.

Exhibit I

"An act amending and extending the provisions of an act of congress entitled 'An act approving with amendments the funding act of Arizona,' approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplementary thereto, approved August third, eighteen hundred and ninety-four.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the provisions of the act of congress approved June twenty-fifth, eighteen hundred and ninety, and August third, eighteen hundred and ninety-four, authorizing the funding of certain

indebtedness of the territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said territory, and the counties, municipalities, and school districts thereof, as provided in the act of congress approved June twenty-fifth, eighteen hundred and ninety, until January first, eighteen hundred and ninety-seven, and all outstanding bonds, warrants, and other evidences of indebtedness of the territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactments of said territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June twenty-fifth, eighteen hundred and ninety, and which said bonds, warrants, and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the act of the legislature by which they were authorized, shall be funded, with the interest thereon which has accrued and may accrue until funded into the lower interest bearing bonds as provided by this act.

“Sec. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commissioners of Arizona under the provisions of the act of congress approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplemental thereto, approved August third, eighteen hundred and ninety-four, are hereby declared to be valid and legal for the purposes for which they were issued and founded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory, as hereinbefore authorized to be funded, are hereby confirmed, ap-

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proved, and validated, and may be funded as in this act provided until January first, eighteen hundred and ninety-seven: provided, that nothing in this act shall be so construed as to make the government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed, and made valid, and authorized to be funded.

“Approved June 6th, 1896.” (29 Stat. 262.)

Exhibit J

CHAPTER 54. (House Bill No. 65)

AN ACT

Ratifying, Approving and Validating the Highway Construction and Improvement Bonds of Maricopa County, in the Sum of Four Million (\$4,000,000.00) Dollars, and the Sale Thereof, Which Bonds Were Authorized to be Issued and Sold by the Board of Supervisors of said County, at an Election by the Property Tax Payers of Said County Held May 17th, 1919, With an Emergency Clause.

WHEREAS, at an election by the property tax payers of Maricopa County, Arizona, held May 17th, 1919, under the provisions of an Act of the Legislature of Arizona entitled, “an Act providing for the creation of County Highway Commissions and prescribing the powers and duties of such commissions,” approved March 8, 1917, and Acts amendatory thereof and supplemental thereto, the Board of Supervisors of said

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county were authorized and empowered to issue and sell the bonds of said county in the sum of Four Million (\$4,000,000.00) Dollars, for the purpose of providing funds for the construction and improvement of certain portions of the public highways of said county; and

WHEREAS, pursuant thereto, the Board of Supervisors of Maricopa County, Arizona, did on the 9th day of July, 1919, enter into a contract of sale of said bonds with the following named persons, partnerships and corporations, to-wit:

Bolger, Mosser & Willaman, by T. J. Grace, Agent,
Elston and Company, by B. K. Blanchet, Agent,
C. W. McNear and Company, by B. K. Blanchet,
Agent,

Whitaker and Company, by B. K. Blanchet, Agent,
Mississippi Valley Trust Company, by B. K. Blanchet, Agent,

Sidney Spitzer and Company, by B. K. Blanchet,
Agent,

Stacy and Braun, by B. K. Blanchet, Agent,
Terry, Briggs and Company, by B. K. Blanchet,
Agent,

Prudden and Company, by B. K. Blanchet, Agent,
A. T. Bell and Company, by B. K. Blanchet, Agent,
Bosworth, Chanute and Company, by B. K. Blanchet, Agent.

Graves, Blanchet and Thornburgh, by B. K.

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Blanchet, Agent, (hereinafter designated as Graves, Blanchet and Thornburgh and associates) by virtue of which contract, the said Board of Supervisors did thereafter deposit said bonds with the Central Trust Company of Chicago, Illinois, to be delivered by it to the said Graves, Blanchet and Thornburgh and associates, upon the payment thereof by them, according to the terms of said contract; and

WHEREAS, the said Graves, Blanchet and Thornburgh and associates have, under the terms of said contract, taken a proportionate part of said bonds and have paid therefor One Million (\$1,000,000.00) Dollars pursuant to the provisions of said contract of sale, which said sum of One Million (\$1,000,000.00) Dollars is now being expended by the Maricopa County Highway Commission in the construction of such public highways; and

WHEREAS, the validity of said bonds and the contract of sale thereof by the board of supervisors of Maricopa County, Arizona, has been and is now questioned and disputed by reason of certain alleged irregularities in the issuance and sale thereof as aforesaid, and litigation in respect thereto is now pending in the courts of the State of Illinois;

NOW, THEREFORE, BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ARIZONA:

Section 1. That the bonds of the County of Maricopa in the sum of Four Million (\$4,000,000.00) Dollars, authorized by the election by the property tax payers of said county held May 17th, 1919, for the

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purpose of providing funds for the construction and improvement of certain portions of the public highways of Maricopa County, and the contract for the sale of such bonds entered into by the Board of Supervisors of said Maricopa County with Graves, Blanchet and Thornburgh and associates on the 9th day of July, 1919, are hereby ratified, approved and declared valid.

Section 2. All acts and parts of act in conflict with the provisions of this act, are hereby repealed.

Section 3. Whereas, it is necessary for the preservation of the public peace and safety, and to prevent a great financial loss to Maricopa County through delay in the construction and improvement of its public highways, an emergency is hereby declared to exist, and this act shall be in full force and effect from and after its passage and approval by the Governor, and this act is hereby exempted from the operation of the REFRENDUM PROVISIONS of the State Constitution.

Approved March 7th, 1921.

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EXHIBIT K.

Chapter 86.

(Senate Bill No. 160.)

AN ACT

Ratifying, Approving and Validating the Highway Construction and Improvement Bonds of Maricopa County, in the Sum of Four Million Five Hundred Thousand (\$4,500,000.00) Dollars, Authorized to be Issued and Sold by the Board of Supervisors of Said County at an Election by the Property Tax Payers of Said County Held December 31st, 1920.

WHEREAS, at an election by the property tax payers of Maricopa County, Arizona, held December 31st, 1920, the Board of Supervisors of said County were authorized and empowered to issue and sell the bonds of said county to the amount of Four Million Five Hundred Thousand (\$4,500,000.00) Dollars, for the purpose of providing funds for the construction and improvement of certain public highways of said county; and

WHEREAS, the right and power of the Board of Supervisors of said county to issue and sell bonds, and the validity of said bonds when so issued and sold by the Board of Supervisors of said county has been and is now questioned and disputed:

NOW, THEREFORE, BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ARIZONA:

Section 1. That the election by the property tax

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payers of Maricopa County, Arizona, held December 31st, 1920, by and through which the Board of Supervisors of Maricopa County were authorized and empowered to issue and sell the bonds of said county to the amount of Four Million Five Hundred Thousand (\$4,500,000.00) Dollars, for the purpose of providing funds for the construction and improvement of certain of the public highways of said county, was a valid election and conferred upon the Board of Supervisors of said county the power and authority to issue and sell said bonds, and that said bonds when issued and sold by said Board of Supervisors are hereby declared to be free from any defect or invalidity by reason of any act or omission of said Board of Supervisors, in calling and holding said election or preparatory thereto.

Approved March 14th, 1921.

United States
Circuit Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON and EQUITABLE LIFE INSURANCE COMPANY OF IOWA,

Appellants,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, Constituting the Board of Supervisors of Maricopa County, Arizona; SIDNEY P. OSBORN, Governor, ANA FROHMILLER, State Auditor, and JIM BRUSH, State Treasurer, Constituting the Loan Commissioners of the State of Arizona; JIM BRUSH, State Treasurer, and ANA FROHMILLER, State Auditor of the State of Arizona,

Appellees.

BRIEF OF APPELLEES APPENDIX NO. 1

Transcript of a Civil Action Filed in the Superior Court of the State of Arizona in and for the County of Maricopa entitled: J. L. GUST, Plaintiff, vs. BOETTCHER AND COMPANY, R. E. MOULTON AND COMPANY, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, Constituting the Board of Supervisors of Maricopa County, JIM BRUSH, State Treasurer, SIDNEY P. OSBORN, Governor, and ANA FROHMILLER, State Auditor, Constituting the State Loan Commissioners of Arizona, Defendants, being Cause No. 52042 in Division No. 1 of said Court.

Upon Appeal from the District Court of the United States
for the District of Arizona

NOV 26 1943

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON and EQUITABLE LIFE INSURANCE COMPANY OF IOWA,

Appellants,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, Constituting the Board of Supervisors of Maricopa County, Arizona; SIDNEY P. OSBORN, Governor, ANA FROHMILLER, State Auditor, and JIM BRUSH, State Treasurer, Constituting the Loan Commissioners of the State of Arizona; JIM BRUSH, State Treasurer, and ANA FROHMILLER, State Auditor of the State of Arizona,

Appellees.

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**Upon Appeal from the District Court of the United States
for the District of Arizona**

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**In the Superior Court of Maricopa County
State of Arizona**

Filed Walter S. Wilson, Clerk, 9:27

By G. F. Ellsworth, Deputy Apr. 24, 1943

No. 52042—Div. 1

**COMPLAINT TO RESTRAIN DELIVERY OF
BONDS**

J. L. GUST,

Plaintiff,

vs.

BOETTCHER AND COMPANY, R. E. MOULTON AND COMPANY, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, JOHN A. FOOTE, ED. OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County, JIM BRUSH, State Terasurer, SIDNEY P. OSBORN, Governor, and ANA FROHMILLER, State Auditor, Constituting the State Loan Commissioners of Arizona,

Defendants.

Comes now J. L. Gust, the plaintiff, and for cause of action against the defendants alleges as follows:

I.

That plaintiff is a resident and a real and personal property taxpayer of Maricopa County, Arizona, and

as such taxpayer brings this action to restrain the defendants from performing an illegal contract to sell, and putting in circulation and selling to bona fide purchasers for value, negotiable refunding bonds of Maricopa County, without having first determined that the bonds proposed to be refunded are legally subject to retirement.

II.

That defendants, Boettcher and Company, R. E. Moulton and Company, and Bank of America National Trust & Savings Association are dealers in bonds engaged in the business of buying and selling municipal bonds for profit;

That defendants John A. Foote, Ed Oglesby and Phil. Isley, constitute the Board of Supervisors of Maricopa County; defendant Jim Brush is the State Treasurer, defendant Sidney P. Osborn is the Governor, and defendant Ana Frohmiller is the State Auditor of Arizona, and said defendants, Brush, Osborn and Frohmiller constitute the loan commission of Arizona.

III.

That pursuant to Chapter II of Title LII of the Revised Statutes of Arizona, 1913, Civil Code, and Chapter 31 of the Session Laws, Regular Session, 1917, and acts amendatory thereof and supplementary thereto, the board of supervisors of Maricopa county, on April 10th, 1919, adopted an order calling an election of the property taxpayers of said county to be held May 17th, 1919, to determine whether the bonds of said county in the sum of Four Million (\$4,000.00) Dollars, should be issued and sold for the purpose of constructing and improving

hard surfaced highways in said county, and said resolution specified that the rate of interest of said proposed bonds should be five and one-half ($5\frac{1}{2}\%$) per cent per annum, payable semi-annually, and the terms and dates of maturity of said bonds should be as follows:

“\$100,000.00 thereof to run for a term of 11 years and to mature on June 15, A. D. 1930;

\$100,000.00 thereof to run for a term of 12 years and to mature on June 15, A. D. 1931;

\$100,000.00 thereof to run for a term of 13 years to mature on June 15, A. D. 1932;

\$100,000.00 thereof to run for a term of 14 years and to mature June 15, 1933;

\$100,000.00 thereof to run for a term of 15 years and to mature on June 15, 1934;

\$200,000.00 thereof to run for a term of 16 years and to mature on June 15, 1935;

\$200,000.00 thereof to run for a term of 17 years and to mature on June 15, 1936;

\$200,000.00 thereof to run for a term of 18 years and to mature on June 15, 1937;

\$200,000.00 thereof to run for a term of 19 years and to mature on June 15th, 1938;

\$200,000.00 thereof to run for a term of 20 years and to mature on June 15, 1939;

\$200,000.00 thereof to run for a term of 21 years and to mature on June 15, 1940;

\$200,000.00 thereof to run for a term of 22 years and to mature on June 15, 1941;

\$200,000.00 thereof to run for a term of 23 years and to mature on June 15, 1942;

\$200,000.00 thereof to run for a term of 24 years and to mature on June 15, 1943;

\$200,000.00 thereof to run for a term of 25 years and to mature on June 15, 1944;

\$300,000.00 thereof to run for a term of 26 years and to mature on June 15, 1945;

\$300,000.00 thereof to run for a term of 27 years and to mature June 15, 1946;

\$300,000.00 thereof to run for a term of 28 years and to mature June 15, 1947;

\$300,000.00 thereof to run for a term of 29 years and to mature June 15, 1948;

\$300,000.00 thereof to run for a term of 30 years and to mature June 15, 1949.”

That notice of said election was given by posting and publication as provided by law and that said notice so posted and published was the order for election and contained the description of said bonds as above set forth including the terms and dates of maturity thereof;

IV.

That said bonds were approved by the majority of the property taxpayers of the county at said election, and thereafter, on June 2nd, 1919, the said board of supervisors of said county canvassed the returns of said election and embodied the facts determined upon said canvass in a certificate and filed and recorded the same in the office of the County Recorder of said county, and in said certificate it was declared as follows:

“That the rate of interest upon said proposed bonds is to be five and one-half ($5\frac{1}{2}\%$) per

cent per annum, payable semi-annually and the term and dates of maturity of said bonds to be as follows, to-wit:

\$100,000.00 thereof to run for a term of 11 years and to mature on June 15, A. D. 1930;

\$100,000.00 thereof to run for a term of 12 years and to mature on June 15, A. D. 1931;

\$100,000.00 thereof to run for a term of 13 years to mature on June 15, A. D. 1932;

\$100,000.00 thereof to run for a term of 14 years and to mature on June 15, A. D. 1933;

\$100,000.00 thereof to run for a term of 15 years and to mature on June 15, A. D. 1934;

\$200,000.00 thereof to run for a term of 16 years and to mature on June 15, A. D. 1935;

\$200,000.00 thereof to run for a term of 17 years and to mature on June 15, A. D. 1936;

\$200,000.00 thereof to run for a term of 18 years and to mature on June 15, A. D. 1937;

\$200,000.00 thereof to run for a term of 19 years and to mature on June 15, A. D. 1938;

\$200,000.00 thereof to run for a term of 20 years and to mature on June 15, A. D. 1939;

\$200,000.00 thereof to run for a term of 21 years and to mature on June 15, A. D. 1940;

\$200,000.00 thereof to run for a term of 22 years and to mature on June 15, A. D. 1941;

\$200,000.00 thereof to run for a term of 23 years and to mature on June 15, A. D. 1942;

\$200,000.00 thereof to run for a term of 24 years and to mature on June 15, A. D. 1943;

\$200,000.00 thereof to run for a term of 25 years and to mature on June 15, A. D. 1944;

\$300,000.00 thereof to run for a term of 26 years and to mature June 15, A. D. 1945;

\$300,000.00 thereof to run for a term of 27 years and to mature on June 15, A. D. 1946;

\$300,000.00 thereof to run for a term of 28 years and to mature on June 15, A. D. 1947;

\$300,000.00 thereof to run for a term of 29 years and to mature on June 15, A. D. 1948; and

\$300,000.00 thereof to run for a term of 30 years and to mature on June 15, A. D. 1949.”

V.

That thereafter, on June 4th, 1919, the said board of supervisors adopted a resolution preparing and fixing the form of said bonds and in said resolution declared that “The bonds of the county of Maricopa to be issued and sold pursuant to the county road bond election held May 17, 1919, in the total amount of Four Million (\$4,000,000.00) Dollars, shall be of the denomination of One Thousand (\$1,000.00) Dollars each; shall be Four Thousand (4,000) in number, shall be numbered from one (1) to four thousand (4,000) inclusive; shall be each dated June 15, 1919; shall each bear interest from date thereof at the rate of five and one-half (5½%) per cent per annum, payable semi-annually on the 15th day of June and December of each year at the office of the County Treasurer of said county of Maricopa; and shall mature upon the respective dates specified in the resolution of the board of supervisors dated April 10, 1919, calling the aforesaid election, and on the ballots used by the electors at said election and in the certificate of the board of supervisors heretofore and on June 2, 1919, filed in the office of the county recorder of said Maricopa county; and shall each and all strictly conform in their tenor and terms to the aforesaid resolution calling said road

bond election.” That the form of bond thereafter set forth in said resolution is attached hereto, marked “Exhibit A” and made a part hereof.

That said resolution further provided “that each of said series of four thousand bonds shall have attached thereto such number of semi-annual interest coupons in the sum of Twenty-seven and 50/100 (\$27.50) Dollars, each, and payable on the 15th day of June and the 15th day of December of each year during the term of said bond as shall be sufficient to evidence all the interest to become due on said bond during the term thereof, and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit:

The County of Maricopa, State of Arizona, hereby promises to pay to the holder hereof on the 15th day of 19....., at the office of the County Treasurer of the County of Maricopa, State of Arizona, Twenty-seven and 50/100 (\$27.50) Dollars, in gold coin of the United States, the semi-annual interest on its highway bond numbered

Election of May 17, 1919.

W. K. BOWEN,
Chairman, Board of Supervisors
Maricopa County, State of
Arizona.

Attest:

Clarence L. Standage
Clerk, Board of Supervisors
Maricopa County, Arizona.

Coupon No.”

VI.

That no recital in said bonds or coupons nor any statement therein contained, gave any indication

whatsoever that said bonds or any of them were subject to call for redemption before their maturity dates, nor did any recital or statement in said bonds or coupons call attention to any statute, law, practice or custom, providing for the call of said bonds for redemption before their respective due dates, and no such statutes, law, practice or custom, ever existed or was suggested in the state of Arizona prior to the attempt to call such bonds for redemption in the year 1942.

VII.

That thereafter said board of supervisors caused to be published a notice inviting proposals for the purchase of said bonds, and said notice contained the following provision:

“Said bonds to be serial bonds, part of which shall mature on the 15th day of June of each year from the year 1930 to the year 1949, both inclusive, as more specifically described in that certificate of the Board of Supervisors relating to said bonds recorded in the office of the County Recorder of Maricopa County on June 2, 1919, in Book 19 of Miscellaneous Records, at page 357.”

That the certificate referred to was so recorded in the county recorder's office and gave the dates of maturity of said bonds as set forth in the order for said bonds hereinabove set forth.

VIII.

That bids for said bonds were received and the bid of Graves, Blanchet and Thornburgh and associates, was accepted. Said bid contained the following provisions:

“For the Four Million Dollars par value legally issued Highway Bonds of Maricopa County, Arizona, complying in all respects with the description of same as contained in your official advertisement of sale, and to be delivered to us on the basis of delayed deliveries as outlined in your Official Notice of Sale, we will pay par and accrued interest to date of deliveries of the bonds, and in addition thereto a premium of Thirty-two Thousand Five Hundred (\$32,500.00) Dollars.”

IX.

That after the said bid was accepted, and on the 9th day of July, 1919, defendant Maricopa County, entered into a formal written contract with the bidders, providing for the sale and purchase of said bonds and that in said contract said Maricopa County expressly covenanted and agreed to sell to the purchasers and the purchasers covenanted and agreed to purchase from said Maricopa County, “the highway bonds of said Maricopa County authorized to be issued by the election held May 17th, 1919, in the amount of \$4,000,000.00 par value; said bonds to comply in all respects with the description of the same as contained in the ‘Notice Inviting Proposals hereinabove set forth’.” That said contract was regularly executed by the Chairman and Clerk of the Board of Supervisors of said Maricopa County by authority of a resolution adopted by said Board of Supervisors on July 9th, 1919.

X.

That after all of said issue of bonds had been executed upon the form set forth in “Exhibit A” hereto attached and the bid of the purchasers therefor had been accepted, and the formal contract for the pur-

chase thereof between said Maricopa county and the purchasers had been executed, and after three thousand of said bonds had been delivered to the purchasers and one thousand of said bonds remained to be delivered to said purchasers the legislature of the state of Arizona adopted Chapter 54 of the Session Laws of 1921, ratifying, approving and validating said bonds and the sale thereof, and in said Act said legislature declared "that the bonds of the County of Maricopa in the sum of Four Million (\$4,000,000.00) Dollars, authorized by the election of the property taxpayers of said county held May 17, 1919, for the purpose of providing funds for the construction and improvement of certain portions of the public highways of Maricopa County and the contract for the sale of such bonds entered into by the board of supervisors of said Maricopa County, with Graves, Blanchett, Thornburgh, and associates, on the 9th day of July, 1919, are hereby ratified, approved and declared valid," and in said Act said legislature further declared that, "all acts and parts of acts in conflict with the provisions of this act are hereby repealed."

XI.

That after the ratification of said bonds by said Chapter 54 of the Session Laws of 1921, they were sold on the open market, and thereafter various purchasers, in reliance upon the proceedings of said board of supervisors hereinabove set forth, and the maturity dates of said bonds as set forth in said proceedings, and said bonds, and the covenants of said Maricopa County to pay interest on said bonds to the maturity dates thereof as provided in said bonds, and the above mentioned act of the legislature of the state of Arizona, ratifying and approving said

bonds in the form authorized as above set forth, and the contract and agreement entered into by said Maricopa county and the original purchasers of said bonds, and the various acts of the legislature of the former territory and the state of Arizona, construing the statutes, and declaring the policy of the state of Arizona, and the acts of the public officials of the state of Arizona and Maricopa county, construing Chapter 2 of Title 52, Revised Statutes of 1913, various purchasers, including trust companies, insurance companies, private citizens, and also the State Treasurer of Arizona for the trust funds created by the Enabling Act, and the Industrial Commission of the State of Arizona, and public authorities of other states, purchased bonds of said issue and paid a large premium for the right to collect interest on said bonds at the rate therein specified, until the respective maturity dates specified in said bonds.

XII.

That pursuant to said Chapter 31 of the Session Laws of 1917 and amendments thereto the board of supervisors of defendant Maricopa county, on November 30, 1920, adopted an order calling an election of the property taxpayers of said county to be held December 31, 1920, to determine whether the bonds of said county in the additional sum of \$4,500,000.00 should be issued and sold for the purpose of constructing and improving hard surfaced highways in said county, and said resolution specified that the rate of interest of said proposed bonds should be 6% per annum, payable semi-annually, and the terms and dates of maturity of said bonds should be as follows:

\$100,000.00 thereof to run for a term of 10 years and to mature on January 15, A. D. 1931;

\$100,000.00 thereof to run for a term of 11 years and to mature on January 15, A. D. 1932;

\$100,000.00 thereof to run for a term of 12 years and to mature on January 15, A. D. 1933;

\$100,000.00 thereof to run for a term of 13 years and to mature January 15, 1934;

\$100,000.00 thereof to run for a term of 14 years and to mature January 15, 1935;

\$200,000.00 thereof to run for a term of 15 years and to mature on January 15, 1936;

\$200,000.00 thereof to run for a term of 16 years and to mature on January 15, 1937;

\$200,000.00 thereof to run for a term of 17 years and to mature on January 15, 1938;

\$200,000.00 thereof to run for a term of 18 years and to mature on January 15, 1939;

\$200,000.00 thereof to run for a term of 19 years and to mature on January 15, 1940;

\$200,000.00 thereof to run for a term of 20 years and to mature on January 15, 1941;

\$200,000.00 thereof to run for a term of 21 years and to mature on January 15, 1942;

\$200,000.00 thereof to run for a term of 22 years and to mature on January 15, 1943;

\$200,000.00 thereof to run for a term of 23 years and to mature on January 15, 1944;

\$200,000.00 thereof to run for a term of 24 years and to mature on January 15, 1945;

\$300,000.00 thereof to run for a term of 25 years and to mature January 15, 1946;

\$300,000.00 thereof to run for a term of 26 years and to mature January 15, 1947;

\$300,000.00 thereof to run for a term of 27 years and to mature January 15, 1948;

\$300,000.00 thereof to run for a term of 28 years and to mature January 15, 1949;

\$300,000.00 thereof to run for a term of 29 years and to mature January 15, 1950; and

\$500,000.00 thereof to run for a term of 30 years and to mature January 15, 1951.

That notice of said election was given by posting and publication as provided by law and that said notice so posted and published was the order for election and contained the description of said bonds as above set forth, including the terms and dates of maturity thereof.

XIII.

That said bonds were approved by the majority of the property taxpayers of the county at said election and thereafter, on January 20, 1921, the said board of supervisors of said county canvassed the returns of said election and declared said bond issue to have been approved by said taxpayers and thereafter, on November 2, 1921, said board of supervisors embodied the facts determined from said canvass in a certificate and filed and recorded the same in the office of the county recorder of said county, and in said certificate it was declared as follows:

“The rate of interest upon the said proposed bonds shall be six percentum (6%) per annum, payable semi-annually and the terms and dates of maturity of said bonds shall be as follows, to-wit:

\$100,000.00 thereof to run for a term of 10 years and to mature on January 15, A. D. 1931;

\$100,000.00 thereof to run for a term of 11 years and to mature on January 15, A. D. 1932;

\$100,000.00 thereof to run for a term of 12 years and to mature on January 15, A. D. 1933;

\$100,000.00 thereof to run for a term of 13 years and to mature on January 15, 1934;

\$100,000.00 thereof to run for a term of 14 years and to mature January 15, 1935;

\$200,000.00 thereof to run for a term of 15 years and to mature on January 15, 1936;

\$200,000.00 thereof to run for a term of 16 years and to mature on January 15, 1937;

\$200,000.00 thereof to run for a term of 17 years and to mature on January 15, 1938;

\$200,000.00 thereof to run for a term of 18 years and to mature on January 15, 1939;

\$200,000.00 thereof to run for a term of 19 years and to mature on January 15, 1940;

\$200,000.00 thereof to run for a term of 20 years and to mature on January 15, 1941;

\$200,000.00 thereof to run for a term of 21 years and to mature on January 15, 1942;

\$200,000.00 thereof to run for a term of 22 years and to mature on January 15, 1942;

\$200,000.00 thereof to run for a term of 23 years and to mature on January 15, 1944;

\$200,000.00 thereof to run for a term of 24 years and to mature on January 15, 1945;

\$300,000.00 thereof to run for a term of 25 years and to mature on January 15, 1946;

\$300,000.00 thereof to run for a term of 26 years and to mature January 15, 1947;

\$300,000.00 thereof to run for a term of 27 years and to mature January 15, 1948;

\$300,000.00 thereof to run for a term of 28 years and to mature January 15, 1949;

\$300,000.00 thereof to run for a term of 29 years and to mature January 15, 1950; and

\$500,000.00 thereof to run for a term of 30 years and to mature January 15, 1951."

XIV.

That thereafter, on the 2nd day of November, 1921, the said board of supervisors adopted a resolution preparing and fixing the form of said bonds and in said resolution declared that:

"The bonds of the County of Maricopa to be issued and sold pursuant to the County Road Bond Election held December 31, 1920, in the total amount of Four Million Five Hundred Thousand (\$4,500,000.00) Dollars, shall be in the denomination of One Thousand (\$1,000.00) Dollars each, shall be four thousand five hundred (4,500) in number, shall be numbered from 4,001 to 8,500, inclusive, shall each be dated January 15, 1921, shall each bear interest from the date thereof at the rate of 6% per annum, payable semi-annually, on the 15th day of January and July in each year at the office of the County Treasurer of the said County of Maricopa, State of Arizona, and shall mature upon the respective dates specified in the resolution of the Board of Supervisors, dated the 16th day of August, calling for the aforesaid election, and on the ballots for the electors in the said election and in the certificate of the Board of Supervisors heretofore on the 8th day of November, 1921, filed in the office of the County Recorder of Maricopa County, and each and all shall strictly conform in tenor and terms to the aforesaid resolution calling said Road Bond Election, the ballots used by the electors at said election, and the aforesaid certificate of the Board of Supervisors recorded on November 8, 1921."

That the form of bond thereafter set forth in said Resolution is attached hereto, marked "Exhibit B", and made a part hereof.

That said resolution further provided, "That each of said series of 4,500 bonds shall have attached thereto such number of semi-annual interest coupons in the sum of Thirty (\$30.00) Dollars each and payable on the 15th day of January and the 15th day of July of each year during the term of said bond as shall be sufficient to evidence all the interest to become due on said bond during the term thereof and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit: (except changes as to dates of payments) 'The County of Maricopa, State of Arizona, hereby promises to pay to the holder hereof on the 15th day of January, 19....., at the office of the County Treasurer of the County of Maricopa, State of Arizona, Thirty (\$30.00) Dollars in gold coin of the United States for the semi-annual interest on its highway bond No.....

Election of December 31, 1920.

Chairman, Board of Supervisors of
Maricopa County, State of Arizona.

Attest:

Clerk, Board of Supervisors,
Maricopa County, State of
Arizona.

Coupon No.....' ''.

XV.

That no recital in said bonds or coupons or any statement therein contained gave any indication whatsoever that said bonds or any of them were subject to call for redemption before their maturity dates nor did any recital or statement in said bonds or coupons call attention to any statute, law, practice or custom providing for the call of said bonds for redemption before their respective due dates and no such statute, law, practice or custom ever existed or was suggested in the state of Arizona prior to the attempt to call such bonds for redemption in the year 1942.

XVI.

That thereafter said board of supervisors caused to be published a notice inviting proposals for the purchase of said bonds and said notice contained the following provision:

“Said bonds to be serial bonds, part of which will mature on the 15th day of January of each year from the year 1931, to the year 1951, both inclusive, as more specifically prescribed in that certificate of the Board of Supervisors relating to the said bonds, recorded in the office of the county recorder of said Maricopa County on November 8, 1921, in Book 24, page 345 of Miscellaneous Records;”

That the certificate referred to was so recorded in the county recorder's office and gave the dates of the maturity of said bonds as set forth in the order for said bonds hereinbefore set forth.

XVII.

That bids for said bonds were received and the bid of Harris Trust & Savings Bank, William R.

Compton Company, Northern Trust Company, Union Trust Company, and Bankers Trust Company, of Denver, was accepted. Said bid was made for the bonds containing the terms of the bonds as set forth in the form attached hereto, marked "Exhibit B", and for the maturities set forth in the proceedings of said board of supervisors for the issuance of said bonds as hereinabove set forth, and the amount of said bid was Four Million Eight Hundred Thousand, One Hundred Fifty (\$4,800,150.00) Dollars, cash, for the four million five hundred thousand (\$4,500,000.00) dollars of bonds.

XVIII.

That after the election of the property taxpayers approving the issuance of said Four Million Five Hundred Thousand (\$4,500,000.00) Dollars of bonds, and after the canvass of the results of said election, and after the determination of the maturities of said bonds as set forth in the order for election, and the call for said election, and as approved by the property taxpayers at said election and prior to the notice inviting proposals for the sale of said bonds, the legislature of the state of Arizona passed chapter 86 of the Session Laws of 1921 ratifying, approving and validating the said bonds as authorized, to be issued and sold by the board of supervisors of said county at an election by the property taxpayers of said county held December 31, 1920, and that in and by said act the legislature of the state of Arizona declared that the said election "was a valid election and conferred upon the board of supervisors of said county the power and authority to issue and sell said bonds and that said bonds when issued and sold by said board of supervisors are hereby declared to be

free from any defect or invalidity by reason of any act or omission of said board of supervisors in calling and holding said election or preparatory thereto"; that said act of the legislature became a law on or about June 14, 1921, and before said bonds were offered for sale.

XIX

That after the ratification of said bonds by said Chapter 86 of the Session Laws of 1921, they were issued in the form approved and ratified by the legislature of Arizona, and were delivered to the said original purchasers thereof and were sold on the open market, and thereafter various purchasers, in reliance upon the proceedings of said board of supervisors hereinabove set forth, and the maturity dates of said bonds as set forth in said proceedings and said bonds, and the covenants of said Maricopa county to pay interest on said bonds to the maturity dates thereof as provided in said bonds, and the above mentioned act of the legislature of the state of Arizona, ratifying and approving said bonds in the form authorized as above set forth, and the various acts of the legislature of the former territory and the state of Arizona construing the statutes and declaring the policy of the state of Arizona, and the acts of the public officials of the state of Arizona, and Maricopa county, construing Chapter 2 of Title 52, Revised Statutes of 1913, various purchasers, including trust companies, insurance companies, private citizens, and also the State Treasurer of Arizona for the trust funds created by the Enabling Act, and the Industrial Commission of the state of Arizona, and public authorities of other states, purchased bonds of said issue and paid a large premium for the right to collect interest on said bonds at the rate therein

specified, until the respective maturity dates specified in said bonds.

XX.

That after the issuance and delivery of said last issue of bonds in the year 1921, defendant, Maricopa County, regularly levied and collected taxes for each of the issues of bonds above set forth and made the semi-annual payments of interest out of the interest fund and retired those bonds that became due and payable on their respective due dates and at no time made any claim or assertion of any right to retire any of said bonds before their due dates until the year 1942; that in the year 1942 the board of supervisors of said Maricopa County adopted a resolution demanding that the State Loan Commissioners of the state of Arizona issue refunding bonds for the purpose of redeeming and refunding all of the bonds of the two issues above mentioned, notwithstanding the fact that said bonds were not yet due and payable and contained no provision for retirement or redemption thereof before their respective due dates; that said loan commissioners of the state of Arizona refused to take any proceedings for such refunding, and, thereupon, the said board of supervisors of Maricopa county, Arizona, brought a mandamus proceeding in the Supreme court of the state of Arizona to compel the state loan commissioners to refund and redeem said bonds under the provisions of Article 4 of Title 10, of Arizona Code, Annotated, 1939, Sections 10-401 to 10-411; that the only party plaintiff to said mandamus proceeding was Maricopa County, and the only parties defendant to said proceeding were Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor and Joe Hunt,

State Treasurer, constituting the loan commissioners of the state of Arizona, and that said plaintiff and said defendants were the only parties to said mandamus suit, and that none of the holders of the bonds of either of the issues above mentioned were parties to said suit, nor were their interests in any way represented in said suit. The Supreme court of Arizona, upon the complaint filed by the plaintiff therein, and the answer thereto filed by the defendants therein, entered its judgment ordering the said loan commissioners to proceed with the refunding of said bonds, and in its opinion stated that said Article 4 of Title 10, Arizona Code Ann. 1939, was applicable to the redemption and refunding of the two issues of bonds above mentioned.

XXI.

That thereafter, the board of supervisors of Maricopa county, again demanded that said loan commissioners proceed with the refunding of said bonds, and said loan commissioners thereupon adopted a resolution calling for bids for bonds to refund the whole remainder of the two issues of bonds above mentioned remaining outstanding. That notice for bids was published, and before the time for receiving bids therein specified, all of the defendants herein were advised that the holders of many of the outstanding bonds proposed to be refunded relied upon the provision in the bonds held by them specifying definite maturity dates, and the covenants of Maricopa county obligating said county to pay the interest on said bonds until their respective due dates, and denied the right of Maricopa county and the loan commissioners of the state of Arizona to call said bonds before their due dates without being given their day in court to determine whether or not said

bonds were callable in violation of the representation to the contrary therein contained, and further denied the power of the Supreme court of the state of Arizona to determine that question, for the reason that said bonds were proposed to be called under the provisions of Article 4 of Chapter 10, Arizona Code Annotated, 1939, which became a law after the issuance of said bonds, and if said article was construed as giving said county or said loan commissioners the power to call said bonds before their due dates, it constituted a law impairing the obligation of the contract between holders of the bonds and said Maricopa county, made when said bonds were issued, and that the determination of that question was vested by the Constitution and laws of the United States in the federal courts, and said defendants were further advised before the time specified for the receipt of said bids that the several bond attorneys who had passed upon previous issues of the bonds of said county would not approve said bonds until said question was determined by the federal courts in a proceeding in which the bondholders were represented, and said defendants were advised by various bond houses and purchasers of municipal bonds, that they would not bid upon said bonds until said question was determined to the satisfaction of said bond attorneys, and that in their opinion, until said question was determined, no bid for the fair market value of said bonds would be received.

XXII.

That on the first day of February, 1943, the date fixed in the Call for Bids, defendants Boettcher and Company, R. E. Moulton and Company, and Bank of America National Trust & Savings Association,

submitted their joint bid for the purchase of said refunding bonds. That the following is a true copy of said bid:

“February 1, 1943.

Loan Commissioners of the
State of Arizona
Phoenix, Arizona

Gentlemen:

For all, but not less than all, of \$4,100,000.00 par value legally issued State of Arizona Refunding Bonds to be dated as of the date of their issuance, to bear interest at the rate of $2\frac{3}{4}$ per cent per annum, payable semi-annually January 15 and July 15, of the denomination of \$1,000.00 each, numbered from 1 to 4100, both inclusive, and maturing \$300,000.00 principal amount on July 15 in each of the years 1944 to 1956, both inclusive, and \$200,000.00 on July 15, 1957, all in accordance with your published notice of sale, we bid you the sum of par and accrued interest to date of delivery, together with a premium of \$800.00. We further agree as part of the purchase price that we will waive interest on the Refunding Bonds from the date of their issue to April 15, 1943, this concession on our part being made for the purpose of enabling you to complete the proceedings for the call and redemption of the outstanding bonds of Maricopa County to the end that double interest will not accrue on both the Refunding Bonds and the outstanding Maricopa County bonds. This bid is subject to the following conditions, each of which is hereby made a condition precedent to any liability on our part.

(1) That this bid shall be accepted promptly, and notice thereof given to us, in no event later than 5:00 o'clock P. M., Pacific War Time, February 10, 1943.

(2) That said Refunding Bonds shall be duly executed and delivered to us on payment of the purchase price therefor not later than 12:00 o'clock Noon, Pacific War Time, March 15, 1942.

(3) That in the event that prior to the delivery of said Refunding Bonds to us the income received by private holders from bonds of the same type and character shall be taxable or subjected to tax or be declared to be taxable by the terms of any Federal Income Tax law either by ruling of the Bureau of Internal Revenue or by decision of any Federal Court or by amendment of the Federal Income Tax laws or otherwise, we may at our election be relieved of our obligations under this agreement to purchase said bonds.

(4) The Loan Commissioners of the State of Arizona and the Board of Supervisors of Maricopa County, State of Arizona, will adopt such proceedings and take such action as may legally be required for the purpose of calling and redeeming the outstanding \$4,100,000.00 principal amount of bonds of the County of Maricopa proposed to be refunded from the proceeds of the issuance and sale of said Refunding Bonds of the State of Arizona and that such outstanding bonds of the County of Maricopa to the amount aforesaid will be called and redeemed from the proceeds of the sale of said Refunding Bonds (which shall be used for no other purpose) and that interest on said bonds of the County of Maricopa will cease from and after the date fixed for such redemption.

(5) That you will furnish us with a full, true and correct transcript of the proceedings for the issuance of said Refunding Bonds duly certified on the basis of which we will be able to secure at our own expense, at or before the delivery of said Refunding Bonds to us, the unqualified legal opinion of Messrs. Orrick, Dahlquist, Neff

& Herrington of San Francisco approving the legality of the proceedings for the issuance of said Refunding Bonds and the proceedings taken or to be taken for the call and redemption of a like principal amount of outstanding bonds of Maricopa County, State of Arizona, in all respects. If our said attorneys are unable to render their opinion approving the legality of said Refunding Bonds and said proceedings for the redemption of said outstanding bonds of Maricopa County in all respects, this bid is to be deemed cancelled and we are to be relieved from all liability hereunder, with like force and effect as thought this bid had not been made.

We hand you herewith cashiers check of the First National Bank of Arizona, which is a member bank of the Federal Reserve System, in the sum of \$205,000.00 payable to the order of the State Treasurer of the State of Arizona, to be held in accordance with your advertised notice of the sale of said bonds, but to be returned to us uncashed in the event you are unable to comply with each and all of the conditions precedent above specified.

Very truly yours,

BANK OF AMERICA NATIONAL
TRUST & SAVINGS ASSOCIATION.
BOETTCHER AND COMPANY
R. E. MOULTON AND COMPANY

By FRANCES MOULTON."

That said bid was the only bid received. That the price stated in said bid is substantially par for bonds bearing $2\frac{3}{4}\%$ interest per annum. That said price was fixed by the bidders with the knowledge that there probably would be no competition in said bidding because of the questioned validity of said bonds, and was at least one-half per cent interest per annum

higher than would have been bid on the market for said bonds if the validity thereof had been properly established. Various other bonding houses and purchasers of municipal bonds would have bid for said bonds and the interest rate would have been at least as low as $2\frac{1}{4}\%$ per annum, if it had been determined prior to said bidding that the bonds proposed to be refunded were redeemable under the constitution of the United States, and that Messrs. Orrick, Dahlquist, Neff & Herirngton of San Francisco, California, who were named in said bid as the attorneys to approve the legal validity of the bonds for said bidders, knew before said bid was submitted that they would not approve said bonds without further proceeding in court, and that said bid offering to purchase said bonds subject to the approval of said attorneys was not made in good faith, but was made with the reservation that said bonds would not be approved and said purchase completed on said bid as made, but that if the said bid was found to be the best bid said bonds would be disapproved until further proceedings to clarify the validity of said bonds and the procedure required for the calling of the bonds to be refunded were had.

XXIII.

That in pursuance of said plan of the said bidders, on February 10, 1943, the last day on which said bid could be accepted according to its terms, said loan commissioners, at the instance of the board of supervisors of Maricopa County, adopted a resolution, of which the following is a copy:

“RESOLUTION OF THE LOAN COMMISSIONERS OF THE STATE OF ARIZONA SELLING \$4,100,000 PRIN-

CIPAL AMOUNT OF REFUNDING BONDS TO BE ISSUED FOR THE PURPOSE OF REDEEMING A LIKE PRINCIPAL AMOUNT OF BONDS OF MARICOPA COUNTY, ARIZONA; PROVIDING FOR THE REDEMPTION OF OUTSTANDING BONDS OF MARICOPA COUNTY, AGGREGATING THE PRINCIPAL AMOUNT OF \$4,100,000; SETTING ASIDE THE PROCEEDS OF THE SALE OF STATE OF ARIZONA REFUNDING BONDS FOR THE PURPOSE OF REDEEMING SAID BONDS OF MARICOPA COUNTY AND DIRECTING NOTICE OF SUCH REDEMPTION TO BE GIVEN.

WHEREAS, the Loan Commissioners of the State of Arizona, heretofore, to-wit, on November 19, 1942, authorized the issuance of \$4,100,000 principal amount of State of Arizona Refunding Bonds and directed notice of sale thereof to be given; and

WHEREAS, such notice of the sale of said Refunding Bonds has been duly given and published and at the time and place fixed for the receipt of bids, the Loan Commissioners duly met to consider all bids received for the purchase of said bonds and to take such action thereon as might be deemed advisable; and

WHEREAS, Bank of America National Trust & Savings Association, Boettcher and Company, and R. H. Moulton and Company, duly filed their bid for the purchase of said bonds at the price of par and a premium accompanied by a cashier's check on the First National Bank of Arizona, which is a member bank of the Federal Reserve System, payable to the Treas-

urer of the State of Arizona in the sum of \$205,000; and

WHEREAS, said bid for the purchase of said bonds and the bidders' good faith check accompanying the same are satisfactory and in accordance with law and the Board of Supervisors of Maricopa County has, by resolution determined that said bid is satisfactory and should be accepted; and

WHEREAS, it appears that said bid should be accepted and said bonds awarded as in this resolution provided;

NOW, THEREFORE BE IT RESOLVED by the Loan Commisisoners of the State of Arizona, as follows:

Section 1. Refunding Bonds of the State of Arizona in the aggregate principal amount of \$4,100,000 are hereby awarded and sold to Bank of America National Trust & Savings Association, Boettcher and Company, and R. H. Moulton and Company in accordance with and subject to the terms and conditions of their said bid as follows, to-wit:

(Here is inserted copy of bid)

Section 2. This award and the sale of said Refunding Bonds is made subject to the following conditions to which said successful bidders have consented and agreed, to-wit:

The Loan Commissioners shall have the right to deliver said Refunding Bonds to said bidders subsequent to March 15, 1943, if it proves to be impracticable to print, lithograph or execute said bonds prior to said date, or to make delivery thereof prior to said date by reason of litigation or any other cause whatsoever, and any delivery of said bonds made subsequent to said date shall constitute good delivery thereof in accordance with said notice of sale, provided all

other terms and conditions of said bid shall have been duly complied with.

Said purchasers shall have the right upon five days written notice to the Loan Commissioners to terminate said extended period of delivery and require that delivery of said bonds be made to them not later than five days from the date of said notice. If such delivery of said bonds is not so made to said purchasers by the State Treasurer or the Loan Commissioners within the said period of five days from the date of said notice, this sale shall be deemed cancelled and both the Loan Commissioners and said purchasers shall be relieved of all obligations one to the other. The Loan Commissioners shall be under no liability for damages for failure to deliver said bonds to said purchasers in the event of cancellation of this sale nor shall said purchasers be under any liability to the Loan Commissioners or the State of Arizona. In the event of such cancellation of this sale the good faith check of \$205,000 deposited by said bidders shall be promptly returned to said bidders.

Section 3. Forthwith upon the payment into the state treasury of the proceeds of the sale of said \$4,100,000 principal amount of State of Arizona Refunding Bonds, the state treasurer shall apportion them to a special fund which is hereby designated the 'Maricopa Highway Bond Redemption Fund'. Out of the moneys in said Maricopa County Highway Bond Redemption Fund the state treasurer shall pay a like principal amount of \$4,100,000 of bonds of Maricopa County designated and referred to in the resolution of the Loan Commissioners adopted November 19, 1942, which is hereby referred to and by reference incorporated herein and made a part hereof.

Section 4. The Board of Supervisors of Maricopa County and the county treasurer

thereof shall cause to be deposited with the state treasurer in a special fund which is hereby designated the 'Maricopa County Highway Bond Interest Fund,' the amounts necessary to pay interest on the bonds of Maricopa County called for redemption, from the last interest payment date to the date of redemption. The moneys in said Maricopa County Highway Bond Interest Fund shall be used and applied by the state treasurer for the payment of interest from the last ensuing interest payment date to the date of redemption of said Maricopa County Bonds.

Section 5. Forthwith upon the deposit of said proceeds of sale of said State of Arizona Refunding Bonds in said Maricopa County Highway Bond Redemption Fund and said interest moneys in said Maricopa County Highway Bond Interest Fund, it is hereby found and determined that there will be in the state treasury of the State of Arizona a sum sufficient for the redeeming of said outstanding bonds of Maricopa County, State of Arizona, for the redemption of which said State of Arizona refunding bonds are authorized to be issued.

Section 6. Upon the deposit of the funds as provided in Section 5 hereof, the state treasurer of the State of Arizona is hereby authorized and directed to call for redemption and to redeem all of the outstanding bonds of Maricopa County more particularly described in the Notice of Redemption hereinafter set forth. The state treasurer shall cause notice of such call for redemption to be published at least two (2) consecutive times in the 'Arizona Weekly Gazette,' a newspaper published in the City of Phoenix, the state capital of the State of Arizona, and in addition thereto said state treasurer shall cause said notice to be published once a week for one (1) month in three (3) newspapers published in the State of Arizona (no two of which shall be published in the same county), and such notice

shall be published in the 'Chandler Arizonan,' a newspaper published and circulated in the County of Maricopa, State of Arizona, and in the 'Nogales International', a newspaper published and circulated in the County of Santa Cruz, State of Arizona, and in the 'Casa Grande Dispatch,' a newspaper published and circulated in the County of Pinal, State of Arizona. In addition to such publications in the State of Arizona, which are hereby declared to be sufficient and to constitute adequate public notice of such call for redemption, the state treasurer is hereby authorized to cause such Notice of Redemption to be published once in 'The Bond Buyer,' a publication in the City and State of New York and of general circulation throughout the United States of America among dealers in municipal bonds and institutions and individual investors holding municipal bonds, and, also, to cause such Notice of Redemption to be published once in the 'Wall Street Journal, Pacific Coast Edition,' a newspaper published in the City and County of San Francisco, State of California, and of general circulation throughout the Pacific Coast of the United States among municipal bond dealers, investors and institutional holders of municipal bonds; but no error or informality in such publication in said newspapers published in New York and San Francisco, respectively, or failure of publication in either or both thereof shall affect the validity of such call for redemption, provided that notice thereof be published in said newspapers in the State of Arizona for the periods above specified. Said State Treasurer is further authorized to cause a copy of such advertised Notice of Redemption to be mailed to Bankers Trust Company of the City of New York, State of New York, and to each bank or trust company or paying agent at which the interest on said bonds of Maricopa County hereby called for redemption was made payable.

Section 7. Said notice of call for redemption shall be substantially in the following form:

**NOTICE OF REDEMPTION
MARICOPA COUNTY, STATE OF ARIZONA
HIGHWAY BONDS**

NOTICE IS HEREBY GIVEN, that pursuant to law and the proceedings of the Board of Supervisors of Maricopa County and the Loan Commissioners of the State of Arizona, all of the following described bonds of Maricopa County, State of Arizona are hereby called for redemption and will be paid on.....1943, to-wit:

Name of Bond	Date of Issue	Bond Numbers (All inclusive)
Maricopa County Highway Bonds	June 15, 1919	2301 to 4000
Maricopa County Highway Bonds	Jan. 15, 1921	6101 to 8500

Said bonds will be redeemed at the face amount thereof and accrued interest thereon to and including, 1943. Said bonds hereby called for redemption must be surrendered on said redemption date (with all interest coupons maturing subsequent to said redemption date) at the office of the state treasurer of the State of Arizona, Capitol Building, Phoenix, Arizona, for payment and cancellation. If any of said bonds hereinabove numbered and described are not presented for payment and cancellation thirty (30) days after the first publication of this notice, to-wit, on or before, 1943, interest on all such bonds will cease from and after said date.

This notice is given pursuant to proceedings of the Loan Commissioners of the State of Arizona and the concurrent action of the Board of

Supervisors of Maricopa County, State of Arizona, adopting and ratifying the same.

Dated, Phoenix, Arizona,, 1943.

State Treasurer of the State of Arizona

County Treasurer of Maricopa County,
State of Arizona.

Section 8. If the state treasurer has knowledge of the names and addresses of the holders of any of said bonds hereby called for redemption, said state treasurer is further authorized and directed to deposit in the United States Post Office at Phoenix, Arizona, a copy of the foregoing notice of call for redemption, enclosed in a sealed envelope with postage thereon prepaid, addressed respectively to such owner or owners whose names and addresses are known to said state treasurer, each of which notices shall be mailed, as above provided, by depositing the same in the United States Post Office at least thirty (30) days prior to said last mentioned redemption date.

Section 9. Whenever such outstanding bonds of Maricopa County hereby called for redemption are presented for payment, the state auditor shall endorse on each bond the amount due thereon and shall write across the face of each bond the date of its surrender and the name of the person surrendering the same and shall keep proper record thereof, and when the state treasurer pays any of said bonds of Maricopa County so called for redemption, he shall cancel such bonds by perforating the same and indorsing thereon by writing or stamping in ink the words 'Redeemed and Cancelled,' with the date of cancellation, and shall thereupon cause said bonds so cancelled to be delivered to the county treas-

urer of Maricopa County, who shall give his receipt therefor, and such receipt shall be full acquittance to the state treasurer and the state auditor of the State of Arizona for the application of the moneys in the Redemption Fund hereinabove specified, used and applied for the purpose of redeeming said bonds of Maricopa County.

Section 10. This resolution shall take effect immediately.

PASSED AND ADOPTED by the Loan Commissioners of the State of Arizona, on this 10th day of February, 1943.

SIDNEY P. OSBORN,
Governor.

ANA FROHMILLER,
State Auditor.

JOE HUNT,
State Treasurer.

LOAN COMMISSIONERS OF THE
STATE OF ARIZONA.”

XXIV.

That the aforesaid resolution of said loan commissioners of the state of Arizona is wholly beyond the power of said loan commissioners, and illegal and void, for the reason that Section 10-404, Arizona Code, Annotated, 1939, prescribes the power of said loan commissioners with respect to accepting said bids and awarding contracts thereon, as follows:

“At the place and time named in said notice, the loan commissioners shall open all bids received by the treasurer and shall award the purchase of said bonds, or any part thereof, to the best bidder therefor. The loan commissioners

may reject any and all bids and may refuse to make any award unless sufficient security be furnished by the bidder for complying with his bid."

That the said resolution of the loan commissioners in fact grants an option to the said bidder of indefinite duration, for it provides no time for the delivery of said bonds and provides that the obligation upon the bidder to take and pay for said bonds may be terminated at any time upon five days' notice, unless delivered within said five days, and when delivered, all other terms and conditions of said bid must be complied with, and one of the conditions is the approving opinion of Messrs. Orrick, Dahlquist, Neff & Herrington, who are the attorneys for the bidders, and are under obligation only to the bidders, and owe no duty to the loan commission of the state of Arizona, or to Maricopa county.

XXV.

That after the said resolution was adopted, Maricopa county, under the direction of said Messrs. Orrick, Dahlquist, Neff & Herrington, brought a further mandamus proceeding against Sidney P. Osborn, Jim Brush and Ana Frohmiller constituting the loan commissioners of the state of Arizona, to require said loan commissioners to proceed with the refunding of said bonds. That Maricopa county was the only plaintiff in said proceedings, and the said loan commissioners were the only defendants, and that none of the holders of the bonds to be redeemed by said refunding issue were made parties to said proceeding, and that the bidders for said bonds were not parties to said proceedings, and that the Supreme Court of Arizona in said mandamus

suit again stated that the bonds proposed to be refunded were callable, and directed the said loan commissioners to proceed with said refunding. That in said mandamus proceeding, the real issues upon which the callability of the bonds proposed to be redeemed depends were not called to the attention of the court; that among other things, the attention of the court was not called to the fact that said two bond issues had been ratified and approved by acts of the legislature of the state of Arizona after the form of the bonds had been approved and become matters of public record. Nor was it called to the attention of said Supreme Court that the provision of the statute under which said court stated that said bonds were callable ceased to be effective as to any indebtedness of the territory of Arizona, incurred after January 1st, 1897, and that after said date the legislature of the territory of Arizona authorized numerous bond issues with specific due dates, and expressly providing that they should be callable after certain dates, and that Chapter 2, Title 52, Revised Code of 1913 is a later enactment than the provision in Chapter 1 of said Title 52, under which said bonds are proposed to be refunded and that said Chapter 2, Title 52, as enacted by the legislature, expressly repealed all acts and parts of acts in conflict therewith, and that from the year 1897 to the year 1942, the fact had been recognized by the public officials of the state of Arizona and of the various counties, municipalities and school districts thereof, and by the legislative bodies of the municipalities, counties, and state of Arizona, that bonds issued in the territory and state of Arizona from the year 1937 to the year 1942, were not callable before their due dates, nor was it called to the attention of the

Supreme court of Arizona that Chapter 4 of Article 10 of Arizona Code Annotated, 1939, became effective in the Arizona Revised Code of 1928, as a new statute, and if the bonds in question were redeemable under the provisions of said act, the same constituted a law impairing the obligation of the contract entered into when the bonds were issued, and that the determination of this question rests finally in the jurisdiction of the federal courts.

XXVI.

That subsequently to the passage of the above resolution of said loan commissioners, and prior to the decision of the Supreme court of Arizona in the mandamus case last mentioned, two owners and holders of bonds owning and holding bonds of the two issues proposed to be redeemed in excess of the sum of \$325,000.00, filed their action in the United States District Court for the District of Arizona, for a declaration as to their right to receive interest on their said bonds until the due dates specified therein, and that thereafter, a citizen of the state of Arizona filed a further action in the United States District Court of Arizona, questioning the right of the State Treasurer, Governor and Secretary of State of the state of Arizona, to surrender bonds of said issues held by them in the state school fund of the state of Arizona. That said actions are pending in said United States District Court for the district of Arizona, and no answers therein have yet been filed by the defendants. That if it should be determined in said actions, or either of them, that the bonds proposed to be redeemed by the refunding issue proposed to be issued and sold by the defendants herein, and said refunding bonds should be issued and sold, the result will be that Maricopa county will have

outstanding a bond issue which to the extent that the bonds proposed to be refunded are not callable, will not be refunding bonds, but will be bonds creating an original indebtedness without the vote of the taxpayers of the county, in violation of the Constitution of the state of Arizona.

XXVII.

That the form of bond proposed to be issued by the defendants and sold upon the open market is set forth in Exhibit C, attached hereto and made a part hereof. That said proposed form of bond contains the following recital:

“It is hereby certified that the bonds of which this is one, are issued in full conformity with the constitution and laws of the state of Arizona, and particularly Article 4 of Chapter 10 of the Arizona Code Annotated, 1939, and that all conditions, acts and things required by the constitution and laws of the state of Arizona to exist, occur and to be performed precedent to and in the issuance of this bond, exist, have occurred and have been performed.”

That said recital is not true. That it is a condition precedent in the issuance of said bonds that the redeemability of the bonds to be refunded has been determined. That such redeemability has not been determined by the proper courts, and that such redeemability is seriously questioned by the holders of some of said bonds, and is in very great doubt, and that if it should be finally determined that said bonds are not redeemable, the taxpayers of Maricopa county, of which the plaintiff is one, will be seriously prejudiced by the issuance of said bonds and the sale thereof to bona fide purchasers for value,

and that even if it should be held that said recital is not binding upon the county, the credit of the county and the interests of the taxpayers thereof will be seriously prejudiced by the issuance of such bonds containing recitals that are not true, to the prejudice of purchasers thereof in good faith and for value.

XXVIII.

That said bonds so proposed to be issued and sold by the defendants contained the following recital:

“And that said county or the treasurer thereof is required by law to pay to the state treasurer of the state of Arizona, on or before the first day of June of each year, the total amount so certified as aforesaid, whether or not the whole amount has been collected from the levy of taxes therefor.”

That said recital is incorrect and is not authorized by Article 4 of Chapter 10, Arizona Code Annotated, 1939, for the reason that the provision in Section 10-407 upon which said recital is based applies only to bonds issued by the loan commissioners for state indebtedness and does not apply to county, municipal and school district indebtedness which is governed by Section 10-409, and that said provision assumes to compel the county to pay the principal and interest on said bonds even though there be a deficiency in the amount collected from the taxes levied for that purpose, and binds the county to make good such deficiency from any funds it may have in its possession, thereby imposing an obligation upon the said county for the payment of the bonds proposed to be refunded, which is not now imposed on said county, was not approved by the taxpayers in voting upon the bonds proposed to be

refunded, and is in violation of the budget law of the state of Arizona, and that said recital, though not authorized by the statute, if said bonds are issued and sold to purchasers in good faith and for value, may bind said county to make such unauthorized payment to the prejudice of the taxpayers thereof.

XXIX.

That if the said Orrick, Dahlquist, Neff & Herrington should approve said bonds proposed to be issued, notwithstanding the pendency of the litigation questioning the redeemability of the bonds proposed to be refunded, and said bonds should be issued, and it should be held that such bonds are not redeemable, Maricopa County will have outstanding, in violation of the constitution of the state of Arizona, bonds to the extent that the bonds proposed to be refunded are not voluntarily surrendered, to the prejudice of the county and its taxpayers. That if the said Orrick, Dalquist, Neff & Herrington do not approve the legal validity of the said bonds proposed to be refunded until the final termination of said litigation in the federal courts, the result is that the option granted to the bidders by the resolution of the state loan commissioners above set forth, will continue in force until the termination of said litigation, and thereupon, if the said litigation determines that said bonds are callable the said bidders will demand delivery thereof if the market is favorable, and if the market be unfavorable, the said bidders will demand the delivery of said bonds more than five days before the termination of said litigation and thereby terminate the contract for purchase and receive back their bidder's check.

XXX.

That substantial damages will result to Maricopa county and its taxpayers if the illegal and void resolution of the state loan commissioners hereinabove set forth, is allowed to stand, for the reason that if the refunding bonds are delivered as provided in said resolution, the bidders will receive, in addition to their legitimate profit, the value of at least one-half per cent per annum interest on said \$4,100,000.00 of refunding bonds which, for the approximately six years average term of said bonds, will amount to at least \$125,000.00.

WHEREFORE, plaintiff prays that the contract proposed to be created between said bidders and said loan commissioners by the said resolution adopted the 10th day of February, 1943, be declared void and illegal, and that said defendants be enjoined from proceeding thereunder, and for such other and further relief as the court may deem proper.

GUST, ROSENFELD, DIVELBESS,
ROBINETTE AND COOLIDGE
201-11 Profesional Building, Phoenix, Arizona

By J. L. GUST,
Attorneys for Plaintiff.

EXHIBIT A

\$1000.00

UNITED STATES OF AMERICA
STATE OF ARIZONA

County of Maricopa
Highway Bond
Election of May 17, 1919

No.

No.

The County of Maricopa, State of Arizona, for value received, hereby acknowledges itself indebted

and promises to pay to the bearer hereof, on the 15th day of June A. D. 19....., the sum of One Thousand Dollars (\$1000.00) in gold coin of the United States, with interest hereon from date hereof in like gold coin at the rate of five and one-half per centum per annum, payable semi-annually on the 15th day of June and the 15th day of December of each year, on presentation and surrender of the interest coupons hereto attached. Both principal and interest aforesaid shall be payable at the office of the Treasurer of the County of Maricopa, State of Arizona.

This bond is one of a series of four thousand bonds of the same date and tenor, except as to maturity, numbered respectively from 1 to 4,000, inclusive, and amounting in the aggregate to four million dollars, (\$4,000,000.00).

This bond is issued by the Board of Supervisors of said County of Maricopa, for the purpose of constructing and improving public highways within and for the said County of Maricopa, pursuant to and in strict compliance with the Constitution of the State of Arizona, and the statutes thereof, including among others Chapter II of Title LII of the Revised Statutes of Arizona, 1913, Civil Code, and Chapter 31 of the Session Laws, Regular Session, 1917, and acts amendatory thereof and supplementary thereto, and in pursuance of a resolution of said Board of Supervisors duly adopted on the 31st day of March, 1919, and the report duly made by the Highway Commission for said county of Maricopa to said Board of Supervisors on the 10th day of April, 1919, and a resolution by said Board of Supervisors duly adopted upon receipt of said report and on said 10th day of April, 1919, and with the assent of a majority of the property taxpayers who were then qualified electors of said county voting at a special election legally called and duly held on the 17th day of May, 1919, for the purpose of determining whether the above-mentioned series of bonds should be issued.

It is hereby certified, recited and declared that all acts, conditions and things, required to be performed, to exist and to happen, precedent to and in the issuance of this bond, have been performed, have existed and have happened in due time, form and manner, as required by law, and that the bonded and other indebtedness of said county, including this bond and all other bonds of the above-mentioned series, does not exceed ten per centum of the taxable property of said county as shown by the last assessment roll thereof.

The full faith, credit and resources of the said county of Maricopa are hereby irrevocably pledged for the punctual payment of the principal and interest of this bond.

IN WITNESS WHEREOF the said County of Maricopa by its Board of Supervisors has caused this bond to be signed by the Chairman and attested by the Clerk of said Board of Supervisors and the seal of the said Board of Supervisors to be hereunto affixed this 15th day of June, 1919.

W. K. BOWEN

Chairman of the Board of Supervisors
of the County of Maricopa, State of
Arizona.

ATTEST:

CLARENCE L. STANDAGE

Clerk of the Board of Supervisors
of the County of Maricopa, State of
Arizona.

2. That each of the said series of four thousand (4,000) bonds shall have attached thereto such number of semi-annual interest coupons in the sum of twenty-seven dollars and fifty cents (\$27.50) each, and payable on the 15th day of June and the 15th day of December of each year during the term of said bond, as shall be sufficient to evidence all the interest to become due on said bond during the term

thereof; and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit:

THE COUNTY OF MARICOPA, STATE OF ARIZONA, hereby promises to pay to the holder hereof on the 15th day of, 19....., at the office of the County Treasurer of the County of Maricopa, State of Arizona, twenty-seven dollars and fifty cents in gold coin of the United States, for the semi-annual interest on its highway bond numbered

Election of May 17, 1919.

W. K. BOWEN

Chairman of the Board of Supervisors
of Maricopa County, State of Arizona.

ATTEST:

CLARENCE L. STANDAGE

Clerk of the Board of Supervisors
of Maricopa County, State of Arizona.

\$27.50

Coupon No.

3. That the following form for registration shall be printed on the back of each of said bonds as many times as space will reasonably permit, to-wit:

This bond is registered pursuant to the statutes in such case made and provided in the name of, and the interest and principal thereof are hereby payable to such owner.

STATE AUDITOR.

EXHIBIT B

\$1000.00

UNITED STATES OF AMERICA
STATE OF ARIZONACounty of Maricopa
Highway Bond

No. Election of December 31, 1920 No.

The County of Maricopa, State of Arizona, for value received, hereby acknowledges itself indebted and promises to pay to the bearer hereof, on the 15th day of January, A. D., 19....., the sum of One Thousand Dollars (\$1000.00) in gold coin of the United States, with interest hereon from date hereof in like gold coin at the rate of six per centum per annum, payable semi-annually on the 15th day of January and the 15th day of July of each year, on presentation and surrender of the interest coupons hereto attached. Both principal and interest aforesaid shall be payable at the office of the Treasurer of the County of Maricopa, State of Arizona, or at in the City of New York.

This bond is one of a series of four thousand five hundred bonds of the same date and tenor except as to maturity, numbered respectively from four thousand one (4,0001) to eight thousand five hundred (8,500) inclusive, and amounting in the aggregate to Four Million Five Hundred Thousand Dollars \$4,500,000.00)

This bond is issued by the Board of Supervisors of said County of Maricopa, for the purpose of constructing and improving public highways within and for the said County of Maricopa, pursuant to and in strict compliance with the Constitution of the State of Arizona, and the statutes thereof, including among others Chapter II of Title LII of the Revised Statutes of Arizona, 1913, Civil Code, and Chapter 31 of the Session Laws of Arizona, Regular Session, 1917, and acts amendatory thereof and supplement-

ary thereto, and in pursuance of a resolution of said Board of Supervisors duly adopted on the 16th day of August, 1920, and the report duly made by the Highway Commission for said County of Maricopa to said Board of Supervisors on the 16th day of August, 1920 and a resolution by said Board of Supervisors duly adopted upon receipt of said report and on said 16th day of August, 1920, and with the assent of a majority of the property taxpayers who were then qualified electors of said county voting at a special election legally called and duly held on the 31st day of December, 1920, for the purpose of determining whether the above-mentioned series of bonds should be issued.

This bond is of the issue which was validated by Act of Legislature of State of Arizona in its Regular Session, 1921, by passage of Senate Bill No. 160, which was approved March 14th, 1921.

It is hereby certified, recited and declared that all acts, conditions and things, required to be performed, to exist and to happen, precedent to and in the issuance of this bond, have been performed, have existed and have happened in due time, form and manner as required by law, and that the bonded and other indebtedness of said county, including this bond and all other bonds of the above-mentioned series, does not exceed ten per centum of the taxable property of said county as shown by the last assessment roll thereof.

The full faith, credit and resources of the said County of Maricopa, are hereby irrevocably pledged for the punctual payment of the principal and interest of this bond.

IN WITNESS WHEREOF THE SAID County of Maricopa by its Board of Supervisors has caused this bond to be signed by the Chairman and attested by the Clerk of said Board of Supervisors, and the

seal of the said Board of Supervisors to be hereunto affixed this 15th day of January, 1921.

GUY F. VERNON
CHAIRMAN of the Board of Supervisors,
of the County of Maricopa, State of
Arizona.

ATTEST:

Clerk, of the Board of Supervisors,
of the County of Maricopa, State
of Arizona.

2. That each of the said series of four thousand five hundred (4,500) bonds shall have attached thereto such number of semi-annual interest coupons in the sum of Thirty Dollars (\$30.00) each, and payable on the 15th day of January and the 15th day of July of each year during the term of said bond, as shall be sufficient to evidence all the interest to become due on said bond during the term thereof; and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit: (Except changes as to dates of payments):

“THE COUNTY OF MARICOPA, STATE OF ARIZONA, hereby promises to pay to the holder hereof on the 15th day of January, 19....., at the office of the County Treasurer of the County of Maricopa, State of Arizona, Thirty Dollars (\$30.00) in gold coin of the United States, for the semi-annual interest on its highway bond numbered

Election of December 31st, 1920.

Chairman of the Board of Supervisors
of Maricopa County, State of Arizona.”

ATTEST:

Clerk of the Board of Supervisors
of Maricopa County, State of Arizona.

\$30.00

Coupon Number.....

3. That the following form for registration shall be printed on the back of each of said bonds as many times as space will reasonably permit, to-wit:

-----19-----

This bond is registered pursuant to the statutes in such case made and provided and in the name of -----, and the interest and principal thereof are hereafter payable to such owner.

STATE AUDITOR.

EXHIBIT C

UNITED STATES OF AMERICA STATE OF ARIZONA

Refunding Bond

No. -----

\$1,000

The State of Arizona, for value received, hereby promises to pay to the bearer of this bond the principal sum of One Thousand (\$1,000) Dollars, on the 15th day of July, 19-----, together with interest at the rate of ----- (-----%) per centum per annum, payable semi-annually on the 15th day of January and the 15th day of July of each year from the date of and until the maturity of this bond upon the presentation and surrender of the attached coupons as they severally become due. Both principal and the interest on this bond are payable at the office of the Treasurer of the State of Arizona in the capitol building, at the City of Phoenix, Maricopa County, Arizona, in lawful money of the United States of America.

This bond is one of a series of Four Thousand One Hundred (4,100) refunding bonds authorized and issued by the State of Arizona pursuant to a demand made by the Board of Supervisors of Maricopa County, State of Arizona, upon the Loan Commissioners of the State of Arizona under the provisions of Article 4 of Chapter 10 of the Arizona Code,

Annotated, 1939, and all other laws of the State of Arizona thereto enabling, for the refunding of a like amount of valid outstanding bonded indebtedness of said Maricopa County, and is payable only from the moneys required to be paid to the State Treasurer of the State of Arizona by said Maricopa County under the provisions of Article 4 of Chapter 10 of the Arizona Code Annotated, 1939.

It is hereby certified that the bonds of which this is one are issued in full conformity with the Constitution and laws of the State of Arizona, and particularly Article 4 of Chapter 10 of the Arizona Code Annotated, 1939, and that all conditions, acts and things required by the Constitution and laws of the State of Arizona to exist, occur, and to be performed precedent to and in the issuance of this bond exist, have occurred and have been performed, and that under the provisions of Article 4 of Chapter 10 of the Arizona Code Annotated, 1939, the State Board of Equalization of the State of Arizona, or on its failure, the State Auditor of the State of Arizona, shall determine the rate of tax to be levied annually on all the taxable property within said county to pay the principal and interest of this bond as they respectively become due and payable and shall certify the same to the board of Supervisors of said county and said Board of Supervisors shall enter such rate upon the assessment rolls of said county as other taxes and that if said county becomes delinquent in the payment of such taxes, said Board of Supervisors shall, before the next levy of taxes, prorate such delinquencies and make such additional levy, in addition to the current annual rate as may be certified to said Board of Supervisors by said State Board of Equalization, or said State Auditor, as may be necessary to pay the principal and interest of this bond and other bonds of this issue at their maturities and that said State Board of Equalization may reconvene said Board of Supervisors for the purpose of entering such rate or additional rate or levy or additional levy as said State Board of

Equalization, or said State Auditor, may certify, as aforesaid, and that said county, or the treasurer thereof, is required by law to pay to the State Treasurer of the State of Arizona, on or before the first day of June of each year, the total amount so certified, as aforesaid, whether or not the whole amount has been collected from the levy of taxes therefor.

For the punctual payment of this bond and the interest hereon, the faith and credit of the State of Arizona are hereby irrevocably pledged only to the extent that it will cause to be levied and collected taxes, as aforesaid, for the payment of the principal and interest of this bond and will pay such principal and interest out of the moneys derived from the collection of such taxes and paid to the State Treasurer of the State of Arizona.

IN WITNESS WHEREOF, the State of Arizona, acting by and through the Loan Commissioners of the State of Arizona, has caused this bond to be signed by the Loan Commissioners of the State of Arizona, countersigned by the State Treasurer of the State of Arizona, and have affixed hereto the Great Seal of the State of Arizona, and the seal of the State Treasurer of the State of Arizona, and has caused the coupons attached to this bond to bear the facsimile signature of the State Treasurer of the State of Arizona, all as of thisday of, 194.....

Governor.

State Auditor.

State Treasurer.

LOAN COMMISSIONERS
OF THE STATE OF ARIZONA

COUNTERSIGNED:

State Treasurer.

COUPON

No. \$.....

On the day of, 19...., the State of Arizona will pay to the bearer, from moneys provided to be paid to the Treasurer of the State of Arizona for that purpose, the sum of (\$.....) Dollars, in lawful money of the United States of America, at the office of the Treasurer of the State of Arizona, at the City of Phoenix, Arizona, being the interest then due on its Refunding Bond dated, 19....., and bearing No.

(FACSIMILE)

.....
State Treasurer.

(Certificate to be endorsed on the reverse
side of each bond)

STATE OF)
ARIZONA) ss.

I, the undersigned, State Auditor of the State of Arizona, do hereby certify that the within bond has been registered by me in the book kept for that purpose in the manner provided by law.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of my office this day of, 19.....

.....
State Auditor.

In The Superior Court
Of the State of Arizona in and for the County
of Maricopa

Filed: Walter S. Wilson, Clerk, 3:32.

By G. F. Ellsworth, Deputy, Apr. 27, 1943.

Filed: Lon Jordan, Sheriff Maricopa Co., Arizona
9:55 Apr. 24, 1943

No. 52042-Div. 1

SUMMONS

J. L. GUST,

Plaintiff,

vs.

BOETTCHER AND COMPANY, R. E. MOULTON AND COMPANY, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; JOHN A. FOOTE, ED. OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County, JIM BRUSH, State Treasurer, SIDNEY P. OSBRON, Governor, and ANA FROHMILLER, State Auditor, Constituting the State Loan Commissioners of Arizona,
Defendants.

THE STATE OF ARIZONA to the above named defendants,

Boettcher and Company,
R. E. Moulton and Company,
Bank of America National Trust & Savings Association;
John A. Foote,
Ed. Oglesby and
Phil Isley, constituting the Board of Supervisors of Maricopa County,
Jim Brush, State Treasurer,
Sidney P. Osborn, Governor, and
Ana Frohmiller, State Auditor, constituting the State Loan Commissioners of Arizona,

YOU ARE HEREBY SUMMONED and required to appear and defend in the above entitled

action in the above entitled court, within TWENTY DAYS, exclusive of the day of service, after service of this summons upon you if served within the State of Arizona, or within THIRTY DAYS, exclusive of the day of service, if served without the State of Arizona, and you are hereby notified that in case you fail so to do, judgment by default will be rendered against you for the relief demanded in the complaint.

The name and address of plaintiff's attorneys is Gust, Rosenfeld, Divelbess, Robinette & Coolidge, 201-11 Professional Building, Phoenix, Arizona.

GIVEN under my hand and the seal of the Superior Court of the State of Arizona in and for the County of Maricopa, this 24 day of April, 1943.

WALTER S. WILSON
Clerk.

By G. F. ELLSWORTH
(COURT SEAL) Deputy Clerk

STATE OF ARIZONA }
COUNTY OF MARICOPA } ss.

I HEREBY CERTIFY that I received the within Summons on the 24th day of April, A. D. 1943, at the hour of 9:55 A. M., and personally served the same on John A. Foote, Ed. Oglesby, Phil Isley, constituting the Board of Supervisors of Maricopa County, Jim Brush, State Treasurer, Sidney P. Osborn, Governor and Ana Frohmiller, State Auditor, constituting the State Loan Commissioners of Arizona, being the defendant named in said Summons, by delivering to John A. Foote, Ed. Oglesby, and Phil Isley, each in person, constituting the Board of Supervisors of Maricopa County, on the 24th day of April, 1943; Jim Brush, in person, as State Treasurer, Ana Frohmiller, in person, as State Auditor, both on April 24, 1943, and Sidney P. Osborn, in person, as Governor

of the State of Arizona, on the 26th day of April, the last three mentioned constituting the State Loan Commissioners of Arizona, County of Maricopa, a copy of said Summons, to which was attached a true copy of the complaint mentioned in said summons.

Dated this 26th day of April, A. D. 1943.

Fees, Service.....	\$9.00	LON JORDAN,
Copies	-----	Sheriff.
Travel, 2 miles.....	.60	
Publication	-----	By W. J. POPE,
Total	\$9.60	Deputy Sheriff.

In the Superior Court of the State of Arizona
In and for the County of Maricopa

Filed
WALTER S. WILSON, Clerk
10:25

By G. F. Ellsworth, Deputy
May 22, 1943

No. 52042—Div. 1

J. L. GUST,

Plaintiff,

vs.

BOETTCHER AND COMPANY, R. E. MOULTON AND COMPANY, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County; JIM BRUSH, State Treasurer, SIDNEY P. OSBORN, Governor, and ANA FROHMILLER, State Auditor, constituting the State Loan Commissioners of Arizona,

Defendants.

ANSWER OF DEFENDANTS JOHN A. FOOTE, ED OGLESBY AND PHIL ISLEY, CONSTITUTING THE BOARD OF SU-

PERVISORS OF MARICOPA COUNTY;
JIM BRUSH, STATE TREASURER, SID-
NEY P. OSBORN, GOVERNOR, AND ANA
FROHMILLER, STATE AUDITOR, CON-
STITUTING THE STATE LOAN COMMIS-
SIONERS OF ARIZONA.

COME NOW the defendants John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Jim Brush, State Treasurer, Sidney P. Osborn, Governor, and Ana Frohmiller, State Auditor, constituting the State Loan Commissioners of Arizona, and for answer to the complaint of plaintiff on file herein, for themselves alone, admit, allege and deny as follows:

FIRST DEFENSE

I.

The complaint fails to state a claim against these defendants upon which relief can be granted.

SECOND DEFENSE

1.

These defendants admit that plaintiff is a resident and real and personal property taxpayer of Maricopa County, Arizona, but deny that any of these defendants herein, or all of them, have performed, or will perform, an illegal contract to sell and circulate negotiable bonds to refund outstanding indebtedness of Maricopa County, and in this respect allege that outstanding Maricopa County Highway Bonds in the aggregate principal amount of \$4,100,000, as particularly described in the complaint herein, are subject to redemption, and will be refunded by the issuance of State of Arizona Refunding Bonds by the Loan Commissioners of the State of Arizona under and pursuant to the provisions of Chapter 1 of Title 52, Revised Statutes of Arizona, 1913, and under the decisions of the Supreme Court

of the State of Arizona in the cases of *Maricopa County vs. Osborn, et al*, 125 Pac. (2d) 703, and *Maricopa County vs. Osborn, et al*, 136 Pac. (2d) 270, Pacific Reporter Advance Sheets, May 14, 1943, Vol. 1, p. 270.

II.

These defendants admit the allegations of paragraphs II, III, IV, and V of plaintiff's complaint.

III.

For answer to paragraph VI of plaintiff's complaint, these defendants allege that notwithstanding the recitals contained in said bonds, or the coupons attached thereto, said bonds are redeemable prior to their maturity dates as provided by Chapter I, Title 52, Revised Statutes of Arizona, 1913, and the decisions of the Supreme Court of Arizona construing said chapter, as aforesaid.

IV.

These defendants admit the allegations of paragraphs VII, VIII, and IX. For answer to paragraph X of plaintiff's complaint, the defendants admit the enactment of Chapter 54, Session Laws of 1941, which validated Maricopa County Highway Bonds as therein provided, but deny that said chapter had the effect of prohibiting, or was intended to prohibit, the refunding of said bonds as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, as construed by the Supreme Court of Arizona, as aforesaid.

V.

For answer to paragraph XI of plaintiff's complaint, these defendants admit that said Maricopa County Highway Bonds were sold in the open market to various purchasers thereof, but these defendants allege that notwithstanding the purchase of said bonds, as in said paragraph alleged, said bonds

are redeemable prior to their maturity dates as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, and the decisions of the Supreme Court of Arizona construing said chapter, as aforesaid.

VI.

These defendants admit the allegations of paragraphs XII, XIII, and XIV of plaintiff's complaint.

VII.

For answer to paragraph XV of plaintiff's complaint, these defendants allege that notwithstanding the recitals contained in said bonds, or the coupons attached thereto, said bonds are redeemable prior to their maturity dates as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, and the decisions of the Supreme Court of Arizona, as aforesaid.

VIII.

These defendants admit the allegations of paragraph XVI of plaintiff's complaint.

IX.

For answer to paragraph XVII of plaintiff's complaint, these defendants admit the allegations thereof, except these defendants allege that notwithstanding the maturity dates as provided in said bonds by the Board of Supervisors of Maricopa County, that said bonds are refundable prior to their maturity dates as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, and the decisions of the Supreme Court of the State of Arizona construing said chapter, as aforesaid.

X.

These defendants admit the allegations of Paragraph XVIII of plaintiff's complaint, but deny that Chapter 86 of the Session Laws of 1921, which vali-

dated said bonds had the effect of prohibiting, or was intended to prohibit, the refunding of said bonds as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, as construed by the Supreme Court of the State of Arizona, as aforesaid.

XI.

For answer to paragraph XIX of plaintiff's complaint these defendants admit that said Maricopa County Highway Bonds were sold in the open market to various purchasers thereof, but these defendants allege that notwithstanding the purchase of said bonds, as in said paragraph alleged, said bonds are redeemable prior to their maturity dates as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, and the decisions of the Supreme Court of Arizona, as aforesaid.

XII.

For answer to paragraph XX of plaintiff's complaint, these defendants admit that Maricopa County levied and collected taxes to retire the principal and interest of the Maricopa County Highway Bonds therein described as the same became due and payable, and further admit that in the year 1942, the Board of Supervisors of Maricopa County adopted a resolution demanding that the Loan Commissioners of the State of Arizona issue refunding bonds for the purpose of refunding said Maricopa County Highway Bonds then outstanding, and further admit that Maricopa County brought an original proceeding in mandamus in the Supreme Court of the State of Arizona to compel the Loan Commissioners of the State of Arizona to refund said outstanding Maricopa County Highway Bonds, and admit that the Supreme Court of the State of Arizona, in said proceeding, entered judgment commanding the Loan Commissioners of the State of Arizona to refund said outstanding Maricopa County Highway Bonds, but deny that the Supreme Court

of the State of Arizona held that said Maricopa County Highway Bonds were refundable under the provisions of Article 4 of Title 10, Arizona Code Annotated, 1939, but in this respect allege that both of the decisions of the Supreme Court of the State of Arizona, as aforesaid, held that said Maricopa County Highway Bonds were refundable under the provisions of Chapter 1, Title 52, Revised Statutes of Arizona, 1913. That J. L. Gust, plaintiff in this cause of action, appeared in said mandamus proceeding in the Supreme Court of the State of Arizona as counsel for the owner and holder of some of said Maricopa County Highway Bonds and while ostensibly appearing in said mandamus proceeding as a friend of the court, nevertheless in fact represented said bondholder, and in said mandamus proceeding was entitled to, and could have presented and raised, all the issues the said J. L. Gust now raises as plaintiff herein. That a copy of the brief filed in the Supreme Court of the State of Arizona in said original mandamus proceeding by the said J. L. Gust, as attorney for said bondholder, is attached to the affidavit of Leslie C. Hardy filed herein contemporaneously with this answer and marked "Exhibit C", and by reference herein incorporated as if made a part hereof. These defendants deny each and every remaining allegation in said paragraph XX of plaintiff's complaint.

XIII.

For answer to paragraph XXI of plaintiff's complaint, these defendants admit that subsequent to the decision of the Supreme Court of the State of Arizona in the first mandamus proceeding filed in that court, the Board of Supervisors of Maricopa County again demanded that the Loan Commissioners of the State of Arizona proceed with the refunding of said outstanding Maricopa County Highway Bonds, and further admit that said Loan Commissioners thereafter adopted a resolution calling for

bids for State of Arizona Refunding Bonds to refund said Maricopa County Highway Bonds then issued and outstanding. Defendants deny each and every remaining allegation contained in paragraph XXI of plaintiff's complaint.

XIV

For answer to paragraph XXII of plaintiff's complaint these defendants admit the Boettcher and Company, R. E. Moulton and Company, and Bank of America National Trust and Savings Association, submitted their joint bid for the purchase of said Refunding Bonds in the words and figures as set forth in said paragraph XXII of plaintiff's complaint, and admit that said bid was the only bid received and provided that said bidders thereby agreed to purchase said State of Arizona Refunding Bonds to bear interest at the rate of $2\frac{3}{4}\%$ per annum. These defendants deny each and every remaining allegation contained in paragraph XXII of plaintiff's complaint.

XV.

These defendants admit the allegations of paragraph XXIII of plaintiff's complaint.

XVI.

For answer to paragraph XXIV of plaintiff's complaint, these defendants deny that the resolution of the Loan Commissioners of the State of Arizona, as set forth in paragraph XXIII of plaintiff's complaint, and as referred to in paragraph XXIV of plaintiff's complaint, is beyond the power of said Loan Commissioners to adopt, and further deny that said resolution is illegal and void. These defendants further deny that said resolution of said Loan Commissioners grants an option to the said bidders to purchase said State of Arizona Refunding Bonds, but admit that one of the conditions in said bid provides that the validity of said refunding bonds shall

be approved by the attorneys therein named. These defendants deny each and every remaining allegation contained in paragraph XXIV of plaintiff's complaint.

XVII.

For answer to paragraph XXV of plaintiff's complaint, these defendants admit that Maricopa County filed a second original proceeding in mandamus in the Supreme Court of the State of Arizona against the Loan Commisisoners of the State of Arizona to require said Loan Commissioners to proceed with the refunding of said Maricopa County Highway Bonds, and allege that the Supreme Court of Arizona in said proceeding again commanded said Loan Commissioners to refund said Maricopa County Highway Bonds, but deny that such action was brought under the direction of the attorneys named in said paragraph XXV of the complaint. These defendants admit that in said mandamus proceeding the only parties thereto were Maricopa County and the Loan Commissioners of the State of Arizona. These defendants admit the allegations of said paragraph XXV of plaintiff's complaint insofar as they assert the existence of the statutes of the State of Arizona therein referred to. Defendants deny each and every remaining allegation contained in said paragraph XXV of plaintiff's complaint, and in this respect these defendants allege that said Maricopa County Highway Bonds referred to therein were at all times, and are now, subject to redemption as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, as construed by the decision of the Supreme Court of the State of Arizona, as aforesaid.

XVIII.

For answer to paragraph XXVI of plaintiff's complaint, these defendants allege that the allegations thereof are wholly immaterial, and in this respect further allege that the proceedings in the

United States District Court for the District of Arizona therein referred to do not control the proceedings and judgment in this court, and in this respect these defendants allege that the Supreme Court of the State of Arizona, by its decisions herein referred to, commanding the refunding of said outstanding Maricopa County Highway Bonds by the Loan Commissioners of the State of Arizona, is the rule of decision to be followed by this court.

XIX.

For answer to paragraph XXVII of the plaintiff's complaint, these defendants admit the recitals contained in the form of said refunding bond as alleged in said paragraph of plaintiff's complaint. These defendants deny each and every remaining allegation in said paragraph contained.

XX.

These defendants admit the recitals contained in the form of said refunding bond as set forth in paragraph XXVIII of plaintiff's complaint. These defendants deny each and every remaining allegation therein contained, and in this respect allege that said Maricopa County Highway Bonds are redeemable as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, as construed by the decisions of the Supreme Court of the State of Arizona, as aforesaid.

XXI.

These defendants deny the allegations of paragraph XXIX of plaintiff's complaint.

XXII.

For answer to paragraph XXX of plaintiff's complaint, these defendants deny that said resolution adopted by the Loan Commissioners of the State of

Arizona is illegal and void. These defendants allege that the adoption of said resolution by the Loan Commissioners of the State of Arizona, and the sale and delivery of the State of Arizona Refunding Bonds as therein provided for, is authorized by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, as construed by the decisions of the Supreme Court of the State of Arizona, as aforesaid.

THIRD DEFENSE

These defendants allege that the cause of action set forth in the plaintiff's complaint is barred by the decisions of the Supreme Court of the State of Arizona, as aforesaid, commanding the Loan Commissioners of the State of Arizona to refund said Maricopa County Highway Bonds, and that said decisions are *res adjudicata* of said cause of action, and are the rule of decision to be followed by this court.

FOURTH DEFENSE

These defendants allege that plaintiff herein has instituted this suit for the purpose of harrassing these defendants, and each of them, and for the purpose of delaying, impeding, hindering, and obstructing these defendants from carrying out and complying with the peremptory writs of mandamus issued out of the Supreme Court of the State of Arizona, as aforesaid, and that the maintenance of this suit by plaintiff constitutes *vaxatious* litigation.

WHEREFORE these defendants pray that plaintiff be denied the relief prayed for by the complaint herein, and that said complaint be dismissed; for such other and further relief as may be meet and

proper in the premises; and for their costs herein expended.

HAROLD R. SCOVILLE
Maricopa County Attorney.

LESLIE C. HARDY
Special Counsel for Maricopa County.

ATTORNEYS FOR THE DEFENDANTS
WHO ARE OFFICIALS OF MARICOPA
COUNTY, ARIZONA.

JOE CONWAY
Attorney General

EARL ANDERSON
Chief Assistant Attorney General.

ATTORNEYS FOR THE DEFENDANTS
WHO ARE OFFICIALS OF THE STATE
OF ARIZONA.

In the Superior Court of the State of Arizona
In and for the County of Maricopa

Filed
WALTER S. WILSON, Clerk
10:25

By G. F. Ellsworth, Deputy
May 22, 1943

No. 52042—Div. 1

MOTION FOR SUMMARY JUDGMENT
UNDER SECTION 21-1211, ARIZONA
CODE ANNOTATED, 1939

J. L. GUST,

Plaintiff,

vs.

BOETTCHER AND COMPANY, R. E. MOULTON AND COMPANY, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIA-

TION; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County; JIM BRUSH, State TREASURER, SIDNEY P. OSBORN, Governor, and ANA FROHMILLER, State Auditor, constituting the State Loan Commissioners of Arizona,

Defendants.

Defendants John A. Foote, Ed Oglesby, and Phil Isley, constituting the Board of Supervisors of Maricopa County; Jim Brush, State Treasurer, Sidney P. Osborn, Governor, and Ana Frohmiller, State Auditor, constituting the State Loan Commissioners of Arizona, move the court as follows:

1. For summary judgment as to the whole of the claim asserted by plaintiff, J. L. Gust.

2. For summary judgment that the judgments of the Supreme Court of the State of Arizona in the two cases entitled *Maricopa County v. Osborn*, Ariz....., 125 Pac. (2d) 703, and *Maricopa County v. Osborn*, Ariz....., 136 Pac. (2d) 270, decided April 12, 1943, respectively, are binding on plaintiff and are *res judicata* as to the matters therein adjudicated and as to all matters herein raised in any way affecting the rights of Maricopa County to call the outstanding Maricopa County Highway Bonds for redemption prior to their respective maturity dates and of the right and authority of the Loan Commissioners of the State of Arizona to issue State of Arizona Refunding Bonds for the purpose of providing moneys for such redemption.

3. For summary judgment that the outstanding Maricopa County Highway Bonds are subject to redemption prior to their fixed maturity dates under the laws of the State of Arizona by and through the issuance of State of Arizona Refunding Bonds, by the Loan Commissioners of the State of Arizona.

4. For summary judgment that the contract of sale of said State of Arizona Refunding Bonds as set forth in the resolution of the Loan Commissioners of the State of Arizona, adopted under date of February 10, 1943, be adjudged to be a valid, legal and binding contract.

5. For summary judgment that defendants have and recover their costs herein incurred.

HAROLD R. SCOVILLE

Maricopa County Attorney

LESLIE C. HARDY

Special Counsel for Maricopa County.

ATTORNEYS FOR THE DEFENDANTS
WHO ARE OFFICIALS OF MARICOPA
COUNTY, ARIZONA.

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney General.

ATTORNEYS FOR THE DEFENDANTS
WHO ARE OFFICIALS OF THE STATE
OF ARIZONA.

In the Superior Court of the State of Arizona
In and for the County of Maricopa

Filed
WALTER S. WILSON, Clerk
10:25

By G. F. Ellsworth, Deputy
May 22, 1943

No. 52042—Div. 1

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

J. L. GUST,

Plaintiff,

vs.

BOETTCHER AND COMPANY, R. E. MOULTON AND COMPANY, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County; Jim Brush, State Treasurer, SIDNEY P. OSBORN, Governor, and ANA FROHMILLER, State Auditor, constituting the State Loan Commissioners of Arizona.

Defendants.

TO: MESSRS. GUST, ROSENFELD, DIVELBESS, ROBINETTE, & COOLIDGE, attorneys for plaintiff herein;

PLEASE TAKE NOTICE, that on the 3rd day of June, 1943, at the hour of 10:00 A. M., or as soon thereafter as counsel can be heard, the undersigned attorneys for the defendants John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Jim Brush, State Treasurer, Sidney P. Osborn, Governor, and Ana Frohmiller, State Auditor, constituting the State Loan Commissioners of Arizona, will appear before

the Judge of the above entitled court, and move that summary judgment be entered herein in accordance with Section 21-1211, Arizona Code Annotated, 1939.

In support of said Motion for Summary Judgment the undersigned counsel for the defendants above named will file with the Clerk of the above entitled court, as constituting a part of the record herein, the following:

1. Motion for Summary Judgment Under Section 21-1211, Arizona Code Annotated, 1939.

2. Affidavit in Support of Motion for Summary Judgment, executed by Earl Anderson.

3. Affidavit in Support of Motion for Summary Judgment, executed by Leslie C. Hardy.

4. Answer of Defendants John A. Foote, Ed Oglesby, and Phil Isley, constituting the Board of Supervisors of Maricopa County, Jim Brush, State Treasurer, Sidney P. Osborn, Governor, and Ana Frohmiller, State Auditor, constituting the State Loan Commissioners of Arizona.

5. Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

Copies of each and all of the foregoing enumerated documents are herewith served upon you as counsel for plaintiff herein.

At the time indicated, as aforesaid, the documents above enumerated, together with the complaint on file herein, and such other parts of the record herein as may be appropriate thereto, will be presented to the Judge of the above entitled Court for his con-

sideration in disposing of said Motion for Summary Judgment.

DATED this 22nd day of May, 1943.

HAROLD R. SCOVILLE
Maricopa County Attorney

LESLIE C. HARDY
Special Counsel for Maricopa County

ATTORNEYS FOR THE DEFENDANTS
WHO ARE OFFICIALS OF MARICOPA
COUNTY, ARIZONA

JOE CONWAY
Attorney General

EARL ANDERSON
Chief Assistant Attorney General

ATTORNEYS FOR THE DEFENDANTS
WHO ARE OFFICIALS OF THE STATE
OF ARIZONA.

On this 22 day of May, 1943, the undersigned counsel for the plaintiff herein, do hereby admit service of copies of the foregoing notice of motion for summary judgment, together with the documents enumerated therein and numbered from one to five inclusive.

GUST, ROSENFELD, DIVELBESS, ROBINETTE & COOLIDGE

By J. L. GUST, (F.),
Attorneys for the Plaintiff.

In the Superior Court of the State of Arizona
In and for the County of Maricopa

Filed
WALTER S. WILSON, Clerk
10:47

By G. F. Ellsworth, Deputy
June 21, 1943

No. 52042—Div. 1

SUMMARY JUDGMENT IN FAVOR OF
DEFENDANTS NAMED

J. L. GUST,

Plaintiff,

vs.

BOETTCHER AND COMPANY, R. E. MOULTON AND COMPANY, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County; JIM BRUSH, State Treasurer, SIDNEY P. OSBORN, Governor, and ANA FROHMILLER, State Auditor, constituting the State Loan Commissioners of Arizona,
Defendants.

The defendants John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Jim Brush, State Treasurer, Sidney P. Osborn, Governor, and Ana Frohmiller, State Auditor, constituting the State Loan Commissioners of Arizona, having moved for summary judgment pursuant to Section 21-1211, Arizona Code Annotated, 1939, and the motion for summary judgment having been argued to the Court on June 3, 1943 by counsel for the plaintiffs and defendants named herein, whereupon the said motion for summary judgment was submitted to the court for decision, and the court, being advised of the law, on June 18, 1943 ordered that said motion for summary judgment be granted in favor of said defendants:

NOW, THEREFORE, in consideration of the premises,

IT IS ORDERED, ADJURED AND DECREED, and the Court does hereby ORDER, ADJUDGE AND DECREE, that defendants John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Jim Brush, State Treasurer, Sidney P. Osborn, Governor, and Ana Frohmiller, State Auditor, and each of them, have summary judgment in their favor against plaintiff herein.

DATED THIS 21st day of June, 1943.

M. T. PHELPS
Judge

APPROVED AS TO FORM:

GUST, ROSENFELD, DIVELBESS, ROBINETTE & COOLIDGE

By J. L. Gust
Attorneys for Plaintiff.

MINUTE ENTRIES

In the Superior Court of Maricopa County,
State of Arizona

Division No. 1

Court convened at 9:30 A. M. Thursday, June 3, 1943. Present: M. T. Phelps, Judge; Walter S. Wilson, Clerk; The Sheriff; the County Attorney; and the Court Reporter.

No. 52042

J. L. GUST,

Plaintiff,

vs.

BOETTCHER AND COMPANY, et al,

Defendants.

Comes now the Plaintiff by counsel, Gust, Rosenfeld, Divelbess, Robinette & Coolidge, by J. L. Gust,

and the Defendants are represented by counsel Harold R. Scoville, by Leslie C. Hardy, Special Counsel for Maricopa County; Joe Conway appearing for the State of Arizona, by his Deputy, Earl Anderson.

At 10:00 A. M. Hearing is had on the Defendants' Motion for Summary Judgment, and the matter is argued by counsel for Defendants.

At 11:20 A. M. Court takes five minutes recess, and at 11:25 A. M. Court resumes.

The matter is further argued by counsel for the Plaintiff, at the conclusion of which, the Court being not fully advised in the premises,

It is ordered the Defendants' Motion for Summary Judgment is taken under advisement.

In the Superior Court of Maricopa County,
State of Arizona

Division No. 1

Court convened at 9:30 A. M. Friday, June 18, 1943. Present: M. T. Phleps, Judge; Walter S. Wilson, Clerk; The Sheriff; the County Attorney; and the Court Reporter.

No. 52042

J. L. GUST,

Plaintiff,

vs.

BOETTCHER AND COMPANY, et al,

Defendants.

This matter having been under advisement, it is ordered by the Court that the Motion for Summary Judgment for the Defendants is granted.

In the Superior Court of the State of Arizona
In and for the County of Maricopa

No. 52042—Div. 1

CLERK'S CERTIFICATE

J. L. GUST,

Plaintiff,

vs.

BOETTCHER AND COMPANY, R. E. MOULTON and COMPANY, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County; JIM BRUSH, State Treasurer, SIDNEY P. OSBORN, Governor, and ANA FROHMILLER, State Auditor, constituting the State Loan Commissioners of Arizona,

Defendants.

STATE OF ARIZONA,)
County of Maricopa.)ss.

I, WALTER S. WILSON, Clerk of the Superior Court of the State of Arizona, in and for the County of Maricopa, do hereby certify that the foregoing pleadings and records, to-wit:

1. Complaint to Restrain Delivery of Bonds;
2. Summons;
3. Answer of Defendants John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County; Jim Brush, State Treasurer, Sidney P. Osborn, Governor, and Ana Frohmiller, State Auditor, constituting the State Loan Commissioners of Arizona.

4. Motion for Summary Judgment under Section 21-1211, Arizona Code Annotated, 1939;

5. Notice of Motion for Summary Judgment;

6. Summary Judgment in Favor of Defendants Named;

7. All Minute Entries;

are a full, true and complete copy and transcript thereof as they were filed and remain of record in the above entitled and numbered cause in my office as the Clerk of the Superior Court of the State of Arizona in and for the County of Maricopa.

I DO FURTHER CERTIFY that plaintiff in this cause of action has not, as of the time of the execution of this Certificate, filed with the undersigned, as the Clerk of said court, a Notice of Appeal from the Summary Judgment in Favor of the Defendants Named dated and filed herein on the 21st day of June, 1943.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at the City of Phoenix, in said County and State, thisday of October, 1943.

WALTER S. WILSON, Clerk of the
Superior Court of the State of Arizona
in and for the County of Maricopa.

(Court Seal)

By G. F. ELLSWORTH,
Deputy.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON and EQUITABLE
LIFE INSURANCE COMPANY OF IOWA,
vs. Appellants,

MARICOPA COUNTY; JOHN A. FOOTE, ED
OGLESBY and PHIL ISLEY, Constituting the
Board of Supervisors of Maricopa County, Arizona;
SIDNEY P. OSBORN, Governor, ANA FROH-
MILLER, State Auditor, and JIM BRUSH, State
TREASURER, Constituting the Loan Commission-
ers of the State of Arizona; JIM BRUSH, State
Treasurer, and ANA FROHMILLER, State Audi-
tor of the State of Arizona, Appellees.

BRIEF FOR APPELLEES

FILED

JOE CONWAY
Attorney General

EARL ANDERSON

Chief Assistant Attorney General
*Attorneys for Appelles who are
State Officials.*

JAMES A. WALSH

County Attorney of Maricopa County

LESLIE C. HARDY

Special Counsel for Maricopa County

GEORGE HERRINGTON

ORRICK, DAHLQUIST, NEFF &
HERRINGTON

*Attorneys for Appellees Maricopa
County and the Officials of
Maricopa County*

Upon Appeal from the District Court of the United
States for the District of Arizona

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON and EQUITABLE
LIFE INSURANCE COMPANY OF IOWA,

vs. Appellants,

MARICOPA COUNTY; JOHN A. FOOTE, ED
OGLESBY and PHIL ISLEY, Constituting the
Board of Supervisors of Maricopa County, Arizona;
SIDNEY P. OSBORN, Governor, ANA FROH-
MILLER, State Auditor, and JIM BRUSH, State
TREASURER, Constituting the Loan Commission-
ers of the State of Arizona; JIM BRUSH, State
Treasurer, and ANA FROHMILLER, State Audi-
tor of the State of Arizona,

Appellees.

BRIEF FOR APPELLEES

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney General

*Attorneys for Appelles who are
State Officials.*

JAMES A. WALSH

County Attorney of Maricopa County

LESLIE C. HARDY

Special Counsel for Maricopa County

GEORGE HERRINGTON

ORRICK, DAHLQUIST, NEFF &
HERRINGTON

*Attorneys for Appellees Maricopa
County and the Officials of
Maricopa County*

Upon Appeal from the District Court of the United
States for the District of Arizona

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United States
Circuit Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON and EQUITABLE
LIFE INSURANCE COMPANY OF IOWA,
Appellants,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED
OGLESBY and PHIL ISLEY, Constituting the
Board of Supervisors of Maricopa County, Arizona;
SIDNEY P. OSBORN, Governor, ANA FROH-
MILLER, State Auditor, and JIM BRUSH, State
TREASURER, Constituting the Loan Commission-
ers of the State of Arizona; JIM BRUSH, State
Treasurer, and ANA FROHMILLER, State Audi-
tor of the State of Arizona,
Appellees.

BRIEF FOR APPELLEES

All issues of law and fact in this case have been
heretofore conclusively determined by the Supreme
Court of Arizona in

*Maricopa County v. Osborn** (decided May 4,
1942; rehearing denied Sept. 16, 1942), 59
Ariz. 244, 125 P. (2d) 703;

*Maricopa County v. Osborn** (decided April
12, 1943), — Ariz. —, 136 P. (2d) 270;

*The 1942 decision is herein referred to as the First Maricopa
Case, and the 1943 decision as the Second Maricopa Case.

and in addition, by the Superior Court of Maricopa County in a taxpayer's suit entitled

*J. L. Gust v. Boettcher and Company, et al**
(See Appendix No. 1 hereof under separate cover).

from which no appeal was taken and the judgment therein is now final and conclusive. Furthermore, these decisions were foreshadowed by the earlier decisions of the Supreme Court of Arizona, as well as by the long series of cases construing the earlier territorial law.** *Toole County Irrigation District v. Moody* (C.C.A. 9th, 1942), 125 F. 2d 498 (Cert. den. 316 U.S. 706, 62 S.Ct. 1281, 86 L.ed. 1762; rehearing denied *Robert Moody et al, Petitioners v. Toole County Irrigation District*, 63 S. Ct. 24, 87 L.ed. 51) is a complete refutation of all contentions advanced by appellants.

* J. L. Gust, appearing as *plaintiff* in the Taxpayer's Suit and suing therein as a taxpayer of Maricopa County in a class suit, appears herein as *counsel* for Appellants. This case is hereinafter referred to as the Taxpayer's Suit.

**The following quotation is from page 6 of the Plaintiff's Brief filed in the Second Maricopa Case in the Supreme Court of Arizona:

"* * * this Court, as early as 1914, specifically pointed out that the outstanding bonded indebtedness of counties and other municipalities was subject to redemption from the proceeds of sale of bonds issued by the Loan Commissioners, viz: *Board of Supervisors v. Hawkins* (May 16, 1914), 16 Ariz. 16, 140 Pac. 821, wherein the Court said:

"* * * * This view finds support from the fact that the Legislature has provided for a Loan Commission authorized and empowered to fund and refund the funded and outstanding indebtedness of counties and other municipalities. Title 52, c. 1, R.S. 1913.' (p. 823).

and from the further fact that the earlier territorial act

A. SUPPLEMENTAL STATEMENT OF CASE

The Preliminary Statement of Appellants is controverted and we submit the *facts* to be as follows:

1. The bonds issued by Maricopa County in 1919 and 1921 are subject to call and redemption immediately upon the issuance of refunding bonds by the Loan Commissioners as specifically provided by the law in effect at the time of their issuance. No subsequent legislation has changed, modified or altered the law in effect when the bonds were issued. (Exhibit A hereof sets forth Ch. 1, Title 52, Revised Statutes of 1913 (Civil Code) opposite the identical language of codified sections of Arizona Code Annotated 1939).

2. Upon such call of the County Bonds for payment, the holders thereof, upon presentation of their bonds, are entitled to payment of the face amount and interest accrued to the redemption date—this right, and this right alone, constitutes the obligation of their contract. The Arizona courts have so held in accordance with the law in effect at the time of the issuance of the bonds and no subsequent statute of Arizona is or could be involved in this proceeding.

creating the Loan Commissioners has repeatedly been before the Supreme Court of the United States and the territorial courts. (Schuerman v. Territory of Arizona, 184 U.S. 342, 46 L. ed. 580; Murphy v. Utter, 186 U.S. 95, 46 L. ed. 1070, 22 S. Ct. 776; Utter v. Franklin, 172 U.S. 416, 19 S.Ct. 183, 43 L.ed. 498; Boyce v. Pima County 24 Ariz. 259, 208 Pac. 419; Schuerman v. Territory, 7 Ariz. 62, 60 Pac. 895; Territory v. Vail, 10 Ariz. 138, 85 Pac. 652; Yavapai County v. McCord, 6 Ariz. 423, 59 Pac. 99; Coconino County v. Yavapai County, 5 Ariz. 385, 52 Pac. 1127; Gage v. McCord, 5 Ariz. 227, 51 Pac. 977; Santa Cruz v. Pima County, 28 Ariz. 287, 236 Pac. 691; Bravin v. Tombstone, 6 Ariz. 212, 56 Pac. 719; Valley Bank v. Brodie, 9 Ariz. 17, 76 Pac. 617.”

3. The County Bonds are subject to redemption under the statutory law which was incorporated in the body of the bonds by express reference therein and made a part thereof at the time of their issuance.

4. Appellants appeared in the First Maricopa Case and were parties thereto (R 89-90, 71-72) and the decision of the Supreme Court of Arizona is therefore *res judicata*. The Second Maricopa Case was a true representative suit—Appellants herein were parties thereto—and the decision therein is *res judicata*.

5. The Taxpayers Suit in the Superior Court of Maricopa County (Appendix No. 1 under separate cover) was instituted by Appellants, by and through their attorney—suing under the guise of a taxpayer—and is *res judicata*.

6. Accordingly, the only issue—namely the “*construction of the bond contract*”—has been conclusively adjudicated by the Courts of Arizona and no Federal question is presented.

Toole County Irrigation District v. Moody
(C.C.A. 9th, 1942) 125 F. 2d 498, (Cert.
den. 316 U.S. 706, 62 S.Ct. 1281, 86 L.ed.
1762; Rehearing denied.....U.S.....,
87 L. ed. 51, 63 S. Ct. 24).

7. The purported Statement of Facts is lifted from the allegations of the Complaint, without reference to the denials in the Answer or the facts disclosed in the Record. The allegations of the Complaint are mere conclusions of the pleader and furnish no foundation for a statement of facts as such. The essential facts disclosed in the record are:

(a) Maricopa County had issued and outstanding \$4,100,000 of its County Highway Bonds dated 1919 and 1921 respectively (R173) bearing interest at 5½% and 6% respectively;

(b) All of these bonds incorporated by reference all the laws of the State of Arizona in existence at the time of their issuance (R 60, 64) ;

(c) On May 4, 1942, the Supreme Court of Arizona in the First Maricopa Case held that Ch. I, Title 52, Arizona Revised Statutes of 1913, was in force and effect at the time of issuance of the bonds, and authorized their call for redemption in the manner therein provided, which decision was affirmed by denial of petition for rehearing on September 16, 1942 (R 88) ;

(d) Thereafter on November 19, 1942, the Loan Commissioners authorized the issuance and sale of \$4,100,000 State of Arizona Refunding Bonds for the purpose of redeeming the Maricopa County Bonds in accordance with said laws in effect at the time of the issuance of said County Bonds (R 172-184) ;

(e) On February 10, 1943, the Loan Commissioners awarded to the successful bidders therefor \$4,100,000 State of Arizona Refunding Bonds, the proceeds of which were to be applied to the payment and redemption of the Maricopa County Bonds (R 114-127) ;

(f) On April 12, 1943, the Supreme Court of Arizona in the Second Maricopa Case issued a peremptory writ directing the execution and delivery of said Refunding Bonds and the application of the proceeds of sale to the payment and redemption of the outstanding Maricopa County Bonds in accordance with the law in effect at the time of their issuance (136 P. 2d. 270) ;

(g) The laws of Arizona in effect at the time of the issuance of the Maricopa Bonds are still in effect at this date without change or alteration of any kind except the immaterial changes in wording due to recompilation in the Annotated Code of 1939 (Exhibit A hereof) ;

(h) In order to defeat and circumvent the decisions of the Arizona Courts and prevent the purchasers from taking delivery of and paying for the Refunding Bonds, plaintiffs caused to be instituted (i) the Taxpayers Suit in the Superior Court of Maricopa County (Appendix No.1 hereof), (ii) this suit in the United States District Court, and (iii) a third suit (Jones v. Brush) in the United States District Court (now on appeal herein and numbered 10560). All three of said cases were disposed of by summary judgments in favor of Appellees.

In their historical analysis of the Territorial law appellants have followed substantially the able brief of Messrs. Cox & Cox which was before the Supreme Court of Arizona in the First Maricopa Case. A summary history of the territorial legislation may be found in

Murphy v. Utter, 186 U.S. 95; 46 L. Ed. 1070; 22 Sup. Ct. 776.

All of the authorities cited in Appellants' Brief were before the Supreme Court of Arizona, and the decisions of that Court are conclusive.

B. FEDERAL JURISDICTION HAS NOT BEEN ESTABLISHED.

Federal jurisdiction is claimed—not upon the ground of diversity of citizenship—but upon the now untenable theory that the Federal Courts possess *independent jurisdiction* to interpret state statutes. In short, by this appeal Appellants seek to reopen

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817.

1. *Mere disagreement with State Court decisions raises no Federal Question.*

Not only were the Arizona Statutes correctly construed by the Arizona Courts, but such construction has been uniform since 1914 (both before and after the issuance of the Maricopa County Bonds) and such construction would in any event be followed by the Federal Courts even prior to the Erie Railroad Case. Uniform decisions of state courts construing their own statutes establish the construction to be given the same statutes in the Federal Courts, irrespective of what views the Federal Court might have entertained had the matter been there presented in the first instance.

35 C. J. S., Federal Courts, §§170, 171 (pp. 1244-1254);

Getz v. Nevada Irrigation District (C.C.A. 9th, 1940), 112 F. 2d 495;

Town of Elmwood v. Marcy, 92 U. S. 289, 23 L.ed. 710;

“ * * * Where the construction has been fixed by an unbroken series of decisions, the Federal Courts accept and apply it in cases before them”. (p. 714).

Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 85 L. ed. 327, 61 S. Ct. 347.

Furthermore, it is equally true that no jurisdiction exists in the Federal Courts to alter the construction of state statutes upon the erroneous theories that the construction adopted by the State Courts

(a) deprived the plaintiff of his property without due process of law, irrespective of whether the State Court adhered to or changed its judicial interpretation;

Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406;

Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556;

O'Neil v. Northern Colorado Irrigation Co., 242 U.S. 20, 61 L. ed. 123, 37 S. Ct. 7;

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 77 L. ed. 360, 53 S. Ct. 145;

or

(b) impaired the obligation of plaintiff's contract within the meaning of Section 10 of Article I of the Constitution;

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. ed. 382, 44 S. Ct. 197 (dispelling this "persistent error");

Fleming v. Fleming, 264 U. S. 29, 68 L. ed. 547, 44 S. Ct. 246.

The Supreme Court has consistently so held even where the state court *changed its own opinion as to the proper construction or scope of a state statute*.

Moore-Mansfield Construction Co. v. Electrical Installation Co., 234 U. S. 619, 58 L. ed. 1503, 34 S. Ct. 941.

2. *The bare allegations of the Complaint are insufficient to raise a Federal Question.*

It appears on the face of the Record that the alleged Federal Question is not substantial—this Court cannot reverse the decisions of the Arizona Courts or retry the issues there involved. The mere allegations of the Complaint—denied in the Answer and unaided by the Record—are insufficient.

Appellants admit that the Revised Statutes of 1913 as carried forward and recodified by Arizona

Annotated Code of 1939 are based upon and follow substantially the wording of the original Arizona Territorial Law of 1887, as amended by the act of Congress of June 25, 1890 (26 Stat. at L. 175). The United States Supreme Court has previously held that Arizona County Bonds are subject to call and redemption prior to their fixed maturity dates under the territorial law, and necessarily the same holding is applicable to the law as recodified in the 1913 and 1939 Arizona Codes. This being so, the point now raised by Appellants has been adjudicated by the United States Supreme Court adversely to their contentions and the so-called Federal Question asserted by Appellants is unsubstantial.

In *Lewis v. Pima County*, 155 U.S. 54, 39 L. ed. 67, 15 S. Ct. 22, the Supreme Court held void bonds of Pima County Arizona, dated July 1, 1883. Their illegality was subsequently cured by the special validating act passed by Congress on June 6, 1896 (29 Stat. at L. 262). In *Utter v. Franklin*, 172 U. S. 416, 43 L. ed. 498, 19 S. Ct. 183, the United States Supreme Court held that the Loan Commissioners were compelled to refund these bonds, stating

“ * * * The first section of the act *requires* the funding of all outstanding obligations of said territory and its municipalities.

* * * * *

“We are therefore of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question. * * *” (43 L. ed. at pp. 501, 502).

Subsequently, in *Schuerman v. Territory of Arizona*, 184 U. S. 342, 46 L. ed. 580, 22 S. Ct. 406, and in *Murphy v. Utter*, 186 U. S. 95, 46 L. ed. 1070, 22 S. Ct. 776, the United States Supreme Court held that a

mandatory duty was imposed upon the Loan Commissioners of Arizona to refund county bonds upon demand of the bondholders themselves whenever the County Board of Supervisors failed to act. The Supreme Court further held that an attempt by Arizona to repeal the act creating the Loan Commissioners of the territory was void because Congress had specially provided that the outstanding bonds "shall be funded." (46 L. ed. at pp. 1077-8).

Furthermore, as stated by the Territorial Court in *Yavapai County v. McCord* (1899) 6 Ariz. 423, 59 Pac. 99, quoting from *Bravin v. Tombstone*, 6 Ariz. 212, 56 Pac. 719:

" * * * As the law stood, therefore, after March 19, 1891, it was the duty of the loan commissioners to fund the outstanding indebtedness of municipalities—First, upon the official demand of municipal authorities; second, upon the application of the holders of such outstanding bonds, warrants, and other evidences of indebtedness as had not been funded."

Hence if bondholders themselves had the right to require their bonds to be refunded against the will of the county, it seems obvious that the bonds in the hands of the bondholders are necessarily subject to call and redemption at the option of the County—in short, either the debtor or the creditor had the unquestioned right to refund the indebtedness through the Loan Commissioners, and the law of Arizona has always so provided. The claim now made that a Federal Question exists is frivolous and utterly without merit—in fact the only real contention of Appellants is that they disagree with the courts of Arizona.

Such lack of substantiality in a Federal Question sufficiently appears when the claim is obviously without merit.

California Water Service Co. v. Redding,
304 U. S. 252, 82 L. ed. 1323, 1325, 58 S.
Ct. 865;

Levering & G. Co. v. Morrin, 289 U. S. 103,
105-6, 77 L. ed. 1062, 1064-5, 53 S. Ct. 549.

McCain v. City of Des Moines, 174 U. S.
168, 43 L. ed. 936, 19 S. Ct. 644;

“The commencement of this suit is plainly an attempt to overturn the decision of the state court in the quo warranto case.”

* * * * *

“In this suit we are bound to take the law of Iowa as it has been decided to be in the quo warranto case. In that case it has been deliberately decided that the validity of the organization of the municipal government in the whole territory in which it has been in practical operation for so long a time cannot be the subject of judicial inquiry by anyone at this late day. Such being the law of Iowa, we are of opinion that an allegation in the bill that this is a controversy and a suit of a civil nature arising under the Constitution and laws of the United States is not supported by the facts appearing in the bill. The facts alleged must show the nature of the suit, and it must plainly appear that it arises under the Constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the Constitution or of some law of the United States, upon the determination of which the recovery depends. *Shreveport v. Cole*, 129 U. S. 36 (32:589); *New Orleans v. Benjamin*, 153 U. S. 411 (38:764).

“Taking the law of Iowa to be as decided in the case mentioned, it appears that the validity of the city government has been sustained by the state court, and in that event there is not a

shadow of a Federal question in this suit, for if the city government be valid, the regularity and validity of the proposed assessment necessarily follow, and there cannot be even a pretense that the collection of the assessment would be without due process of law.

“The allegation that the suit arises under the Constitution of the United States is so palpably unfounded that it constitutes not even a color for the jurisdiction of the Circuit Court.”

Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U. S. 388, 64 L. ed. 626, 40 S. Ct. 404;

“There is an assertion in words, of rights under the Constitution of the United States, and the only question now presented is whether the assertion is justified by the allegations of the bill.”

* * * * *

“The court rejected the contention holding that it was not tenable under the law and Constitution of Ohio. To sustain this view the court cited prior Ohio cases, and certain cases on the docket of the court, * * * .”

* * * * *

“The court, therefore, was considerate of the elements of the case and of plaintiff’s rights, both against defendants as rival companies or as landowners; and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a Federal court unless there be involved a Federal question. And a Federal question not in mere form, but in substance, and not in mere assertion, but in essence and effect. The Federal questions urged in this case do not satisfy the requirement.”

See also:

O'Callaghan v. O'Brien, 199 U. S. 89; 50 L. ed. 101, 25 S. Ct. 727;

California Oil & Gas Co of Arizona v. Miller, 96 Fed. 12;

Marshall v. Desert Properties Co., (C.C.A. 9th), 103 F. (2d) 551 (Cert. den. 308 U. S. 563, 60 S. Ct. 74, 84 L. ed. 473).

Western Union Tel. Co. v. Ann Arbor R. Co., 178 U.S. 239, 44 L. ed. 1052, 20 S. Ct. 867;

“When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, *ante*, 276, 20 Sup. Ct. Rep. 222.”

Wallace Ranch Water Co. v. R. R. Com., (C.C.A. 9th), 47 F. (2d) 8;

“ * * * there was no basis whatever for invoking the jurisdiction of the federal court in the first instance, because the identical right asserted had been repeatedly decided by the Supreme Court adversely to the contention made by the appellant. Under such circumstances, the federal question has ceased to be one of substance,

and the federal court is without jurisdiction for any purpose. *Fukunaga v. Territory of Hawaii* (C.C.A.) 33 F. (2d) 396; *Kimbrel v. Territory of Hawaii* (C.C.A.) 41 F. (2d) 740.”

C. THE FUNDAMENTAL FALLACY UNDERLYING THE POSITION OF APPELLANTS IS THE CLAIM — BASED ON MERE ASSERTION AND WHOLLY UNSUPPORTED BY THE FACTS—THAT THE STATE OF ARIZONA *BY SUBSEQUENT LEGISLATION* HAS IMPAIRED THE OBLIGATION OF THE MARICOPA BONDS OR DEPRIVED THE HOLDERS OF THEIR RIGHTS WITHOUT DUE PROCESS OF LAW. THE 1939 CODE IS MERELY A RECOMPILATION OF THE 1913 REVISED STATUTES.

The law, and the only law of the State of Arizona, applicable to these proceedings is the law in effect at the time the bonds were issued; namely, Chapter 1 Title 52, Revised Statutes of Arizona, 1913 (Civil Code)*. The mere fact that the Revised Statutes of 1913 were recompiled and recodified in the Arizona Annotated Code of 1939 is wholly immaterial. No change was effected in the statutory law other than the usual verbal changes which take place in the compilation of any statute such as, for example, the verbal changes made in the Act of Congress in their recompilation in the United States Code Annotated. A simple comparison of the wording of the 1913 Statutes and the same sections as recompiled in the Annotated Code of 1939 will demonstrate this statement.**

*Set forth verbatim in Exhibit A hereof.

**Vd. Exhibit A hereof.

But even this clerical task may be avoided by the Federal Court for good and sufficient reasons.

First: Even if it were assumed that the Annotated Code of 1939 was an entirely new statute—and not merely a codification—its enactment did nothing more than to reinstate the parties to their original rights as they existed under the Revised Statutes of 1913. Such is the rule adopted by the Supreme Court of the United States and no Federal Question exists.

In *Knights' Templars & M. L. Indemnity Co. v. Jarman*, 187 U. S. 197, 47 L. ed. 139, 23 S. Ct. 108, the court stated (47 L. ed., pp. 146-7) :

“A second objection to the application of this statute is that if the petitioner be right in his contention that, by the repeal of the suicide statute, the contract between the assured and the company relieving the latter from liability in case of suicide, became effective, the legislature could not thereafter, by re-enacting the statute or attempting to subject assessment companies to its provisions, impair the contract subsisting between the assured and this petitioner.

“The answer to this argument is not difficult. No new contract was made, and no new rights were vested, between the act of 1887, repealing the suicide statute, and the act of 1897 restoring it. All that the latter act purported to do was to reinstate the parties in their original rights prior to the act of 1887, which rights had not been affected by anything done during the ten years between the two acts. Upon defendant's theory, if the act of 1887 had been in existence but a single day the same result would have followed.”

Substantially the same question was before the Supreme Court of the United States in *Murphy v.*

Utter, 186 U. S. 95, 46 L. ed. 1070, 22 S. Ct. 776, wherein the Supreme Court of the United States held that the Loan Commissioners of Arizona was a continuing body whose existence and right to issue refunding bonds of the State of Arizona was not affected by the repeal or abrogation of the prior statute creating the Loan Commissioners, particularly as Congress substantially re-enacted the territorial act and thereby gave it vitality and existence as a valid law of the Territory of Arizona. See, also, *Utter v. Franklin*, 172 U. S. 416, 43 L. ed. 498, 19 S. Ct. 183.

Second: The decisions of the State Courts are based on the 1913 Statutes and the positive holdings that no changes therein were effected by the 1939 recodification. Since 1913 the entire statutory law of Arizona has been twice recompiled, viz, in 1928 (Revised Code of 1928) and again in 1939 (Arizona Code Annotated, 1939). It was not intended that the Annotated Code of 1939 should change the previously existing law, which is the same in legal effect as in its original form, although the language may be modified solely for purposes of codification.

The Supreme Court of Arizona so held in both the First and Second Maricopa Cases.

First Maricopa Case:

“ * * * Paragraph 5251, Revised Statutes of 1913, which is Section 1 of Chapter 29, 1st S.S. of the First Legislature, carried into the revision of that year, and is now incorporated in Section 10-401, A.C.A. 1939, provides for the Loan Commission in this language: * * * ” (125 P. 2d at page 705).

“Paragraph 5252, the substance of which is now included also in Section 10-401 A.C.A. 1939, reads as follows; * * * ” (125 P. 2d at page 705).

“ * * * The other provision of the Revised Statutes of 1913 which plaintiff contends makes the bonds redeemable and refundable by the Commission prior to the date of maturity is paragraph 5253, which is carried into the 1939 A. C.A. as Section 10-402, and reads as follows: * * * ” (125 P. 2d. at pps. 706-707).

“ * * * The following statement, which is the last sentence of Paragraph 5260, supra, and was the law when the bonds in question were issued and under which they must be refunded * * * ” (125 P. 2d at page 707).

Second Maricopa Case:

“ * * * Section 10-406, Arizona Code 1939, which is the same as paragraph 5258 of the 1913 Civil Code, provides: * * * ” (136 P. 2d at page 272).

The Supreme Court of Arizona having so held, we submit that the Federal Courts are bound to follow the judgments of the State Courts as to whether or not the Arizona Annotated Code, 1939, effected any change in the Revised Statutes of 1913, which is a question solely of state law.

Bacon v. State of Texas, 163 U. S. 207, 41 L. ed. 133, 16 S. Ct. 1023.

Defendants purchased land from the State of Texas measured by a survey which was claimed to be sufficient under the laws in effect at the time the survey was made. In 1879 the Revised Statutes of Texas took effect, which it was contended changed the existing law. The Supreme Court in construing the section of the Revised Statutes said:

“ * * * Whether this article in question was or was not a mere revision and continuation of existing law, and whether the changed phrase-

ology properly called for a change of construction, were questions entirely for the state court to determine.” (41 L. ed. at page 139).

In the same case it was also held that the Federal Court is without jurisdiction where the state court has decided the case on grounds independent of any alleged subsequent statutes.

In both the First and Second Maricopa Cases the Supreme Court of Arizona rendered its decision upon the plain terms of the Revised Statutes of 1913 without giving consideration whatsoever to any alleged change in the phraseology of the 1939 Arizona Code Annotated.

Third: Furthermore, a critical examination of both the First and Second Maricopa Cases indicates clearly that the Supreme Court of Arizona not only based its decisions entirely upon the language contained in the Revised Statutes of 1913, but was required to do so under the established law of Arizona that the subsequent recodification of the law did not change the statutes in existence at the time, but merely recodified and compiled them in more convenient form.

State v. Stewart, 57 Ariz. 82, 111 P. (2d) 70; (so stating with respect to the 1939 Annotated Code).

In *Peterson v. Central Arizona Light & Power Co.* (1940), 56 Ariz., 231, 107 P. 2d 205:

“We have held that when a previously existing law is carried forward into the Revised Code of 1928, it is presumed to be the same in legal effect as to its original form, even though the language be changed, unless it appears unmistakably it was the intent of the legislature to make

a change in its meaning.” (107 P. 2d at page 208).

In *Walker v. Peoples Finance and Thrift Co.* (1935) 46 Ariz. 224, 49 P. 2d. 1005:

“ * * * Keeping in mind that the purpose in preparing the Revised Code of 1928 was, ‘to reduce in language and avoid redundancy’ and to change the meaning of the existing law as little as possible in accomplishing this task we should * * * indulge the presumption that ‘when a word, a phrase, or a paragraph from the 1913 Code is omitted from the Code of 1928, *the intent is rather to simplify the language without changing the meaning, than to make a material alteration in the substance of the law itself.*’ ” (Emphasis ours) (49 P. 2d at page 1007).

In *Melendez v. Johns* (1938) 51 Ariz. 331, 76 P. 2d 1163:

“ * * * We should not overlook that we have adopted a rule of construing the provisions of the Revised Code of 1928 where changes in the language have been made, to the effect that we will regard such changes as an effort to harmonize or reduce in language or remove inconsistencies, rather than an effort to change the meaning of the law.” (76 P. 2d at page 1166.)

The rule in Arizona is one of general application, it being held that minor changes in wording solely for the purpose of codification do not effect any change in the original statute or the rights or obligations created thereunder.

It is stated in 59 C. J. 894-895 §493:

“A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not nec-

essarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable. Usually a revision of statutes simply iterates the former declaration of legislative will. No presumption arises from changes of this character that the revisers or the legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears.”

This is the rule followed by the United States Supreme Court as announced in *McDonald v. Hovey*, 4 S. Ct. 142, 110 U. S. 619, 28 L. ed. 269, where it was stated (p 272):

“So upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—Some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const., 365. As said by the New York Court for the Correction of Errors, in *Taylor v. Delancy*, 2 Cai. Cas., 150: ‘Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the Legislature to work a change.’ ”

See, also:

2 *Lewis*, *Sutherland, Statutory Construction*, 857-858, §451:

“On the other hand the mere re-enactment of a statute in a code or revision has been held not to change its meaning, construction or effect. *And this is held to be true though the sections of an act are separated and arranged in different connections.*” (Emphasis ours).

The authority for the recompilation of the Arizona Code of 1939 is found in sections 1 to 7 (1 Ariz. Code Annotated, 1939, pp. 307-8). The authority was limited by section 1 to the

“recompilation, annotation and indexing of said Code.”

By section 3 of the Act, the Secretary of State was required to compare the proof of the Annotated Code with the enrolled laws on file in his office and

“when such recompilation is found to be a correct reproduction of the statutory law therein contained”

a certificate to that effect was to be issued to the publisher. Clearly the Annotated Code of 1939 is purely a recompilation of existing statutory law.

Furthermore, irrespective of any change in wording, no intent to amend the 1913 Statutes creating the Loan Commissioners and authorizing the issuance of refunding bonds can be inferred. Section 1-110 of the Annotated Code of 1939 specifically provides:

“No repealing act shall affect any law funding the territorial or state debt, or any law for issuing territorial or state bonds, or any law heretofore passed * * * for the payment of any interest on territorial, state or county bonds heretofore authorized to be issued, or any act incorporating or chartering municipal corporations. (R.S. 1901, §4249; 1913, §5562; rev., R.C. 1928 §3047.]”

Accordingly it is clear that the provisions of Chapter 11, Title 52, Revised Statutes of 1913, creating the Loan Commissioners and providing for the issuance of refunding bonds were continued in force as Sections 10-104 et seq., of Article 4 of Chapter 10

of the Arizona Code Annotated, 1939, without material change, alteration or amendment, and no new statute was created by the pure recompilation of the 1913 Statute into the Arizona Code Annotated of 1939.

There is accordingly no subsequent legislation of the State of Arizona involved in this proceeding. The fallacy underlying Appellant's claim is the more glaring as it is based merely upon assertions wholly unsupported by the record. In truth and in fact the claim of impairment is really based, not upon any alleged subsequent legislation of the State of Arizona, but, solely upon the ground that Appellants disagree with the conclusions reached by the Supreme Court of Arizona in the First and Second Maricopa Cases and the conclusions of the Superior Court of Maricopa County in the Taxpayer's Suit, and seek to have these decisions reviewed in a separate proceeding instituted in the Federal Court. There is a total failure of Federal jurisdiction, for the question of what the bond contract was is to be resolved by determining what the state law attached to the contract at the time the bonds were issued. (Holmes, Cir. J., specially concurring in *Cone v. Rorick*, 112 F. 2d. 894, at page 897). See, also, *Defoe v. Town of Rutherfordton*, 112 F. 2d 342 at page 344; Cf. *Memphis & Co. R. Co. v. Pace*, 282 U.S. 241, 75 L. ed. 315 51 S. Ct. 108; *Phelps v. Bd. of Education*, 300 U.S. 319, 81 L. ed. 674, 57 S. Ct. 483.

A R G U M E N T

I

THE FEDERAL COURTS ARE NOT PERMITTED TO EXERCISE THEIR INDEPENDENT JUDGMENT ON THE MERITS OF THE CASE CONTRARY TO THE LAWS OF ARIZONA AS DETERMINED BY THE JUDGMENTS OF THE COURTS OF THAT STATE WHICH ARE NOW RES JUDICATA AND PLEADED AS SUCH.

1. *The Amended Complaint presents no case of impairment of the contract for the obvious reason that no subsequently enacted legislation is involved.*

(a) *The allegations of the Complaint are insufficient.* The mere allegation in the Complaint (R-4) that jurisdiction is invoked upon the ground that the case arises under the Constitution of the United States is wholly inadequate. The jurisdiction of the Federal Court does not arise by virtue of an averment where it plainly appears that the averment is not real and substantial, but is without color or merit.*

Newburyport Water Company v. Newburyport, 193 U.S. 561, 24 S. Ct. 553, 48 L. ed. 795.

It was also alleged in the Complaint (R4) that jurisdiction was vested upon the grounds of diversity of citizenship. The fact that this position has been abandoned on appeal shows how untenable is the claim to a Federal Question.

*See pages 6 to 14 incl., supra.

(b) *The State law makes the bond contract.* The issuance of the bonds created contracts under the laws in existence at the time the bonds were issued and such was the holding in the First Maricopa Case. (125 P. 2d. 703). The interpretation of the contract, viz., the state law “*when the bonds in question were issued and under which they must be refunded*” (125 P. 2d. at page 709) is conclusively determined by the State Courts. (*Toole County Irrigation District v. Moody*, supra).

Sambor et al. v. Philadelphia Rapid Transit Co. et al., 27 Fed. (2d) 406. (Appeal dismissed for want of substantial Federal question, 278 U.S. 572, 73 L. Ed. 513, 49 S. St. 93.) states the true doctrine:

“ * * * The true doctrine we think to be this: The courts of the United States must, as before stated, put their own interpretation upon the national Constitution, whatever its meaning may be elsewhere thought to be, but, when they are dealing with its application to a fact situation made up of a contract, the law which is the law of a state, and which is to be construed under the Constitution and statutes of that state, the United States courts are bound to accept the meaning of the state Constitution and statutes given to them by the courts of the state.”

* * * * *

“There is no impairment of the obligation of a contract when it is carried out in accordance with its terms and the contract there was read (as the present contract has been read by the state courts) as including among its terms that it was subject to the exercise of the police power of the state. There are two provisions of the Constitution of Pennsylvania, each of which in verbiage confers an absolute power. One grants to municipalities the power to consent or refuse

to railway companies permission to occupy streets, the other reserves to the state the exercise, through the Legislature, of its police powers. If there is conflict between the two, some one must declare the true meaning of the Constitution in respect to which of these provisions is dominant and controlling. It must be that this meaning is to be declared by the courts, and, as the meaning to be found is that of a state Constitution, it must be found by the courts of the state. The courts of Pennsylvania have ruled that the meaning of the state Constitution is that every transaction and every contract, the law of which is the law of the state, has incorporated in it that it is subject to the exercise of the police power of the state.

“As the contract before us thus contains this provision, it follows that the enforcement of this provision of the contract is no impairment of its obligation, and that the quoted clause of the national Constitution has in further consequence no application, and the bill should be dismissed, with costs, for want of equity. It should perhaps be added that, independently of the conclusion reached that the bill shows no cause of action, we find no occasion for the issuance of a restraining order.”

(c) *The meaning and effect of the state statutes, i.e. the bond contract, have been determined by the State Courts.* Appellants concede that no Federal Question is involved by their own admission :

“ * * It thus appears that the controversy involves principally the interpretation of the contracts created by the issuance of the bonds which does not present a question of federal jurisdiction but a question of the merits to be independently determined by the federal courts in the exercise of the jurisdiction conferred upon them

by the federal constitution and statutes.” (Brief for Appellants, pp. 53-4).

If the sole controversy is the question of the proper interpretation of the contract, obviously this is a matter of state law to be determined by the state courts and no power is vested in the Federal Courts to change the interpretation of a contract brought into existence by state law and previously interpreted by the state courts.

Toole County Irrigation District v. Moody
(supra).

(d) *Breach of contract (if any) does not rise to the dignity of impairment.* The allegations of the Amended Complaint that the Plaintiff’s contract rights are being threatened is wholly insufficient to state a Federal Question. The most that the Complaint alleges is a possible or theoretical breach of an alleged contract (i.e. not the true contract, but a theoretical contract according to the terms thereof as construed by Appellants) and the rule is well-settled that the Federal Courts have no power to decide, independently of state law, questions which involve only the breach of a contract (as distinguished from any federal question involving impairment).

In *McCormick v. Oklahoma City*, 236 U.S. 657, 35 S. Ct. 455, 59 L. ed. 771 it is said:

“ * * * The basis of the latter allegation is that complainant had binding contracts with the city which the city refused to permit him to perform. Their breach is alleged and nothing more, and the allegation gets no other quality or character by the assertion that complainant had a ‘vested right of property’ in the contracts or their performance, and that to take this away

is a deprivation of property without due process of law. Nor would such be the result if complainant had averred that the circumstances amounted to an impairment of the obligation of his contract,—a contention which he in effect urged upon the oral argument. * * * It follows that the bill presents a case of diversity of citizenship only, and the decree of the circuit court of appeals was final.” (59 L. ed. at pp. 772-773).

Shawnee Sewerage & D. Co., v. Stearns, 220
U. S. 462, 31 S. Ct. 452, 55 L. ed. 544:

* * *

“The city, it is alleged, has not attempted to comply with the contract, but, on the contrary, has made a contract with the Newman Plumbing Company to lay the laterals it desires. A simple breach of contract is therefore alleged on the part of the city.

* * *

“It is clear, therefore, that, on the face of the bill, the circuit court had no jurisdiction of the suit, there being no diversity of citizenship, and no real and substantial question arising under the Constitution of the United States being presented by the bill.” (55 L. ed. at page 547).

Dawson v. Columbia Ave. Sav. Fund, etc. Co., 197 U.S. 178, 25 S. Ct. 420, 49 L. ed. 713:

“We are of opinion that the bill should have been dismissed for want of jurisdiction.”

* * * * *

“The bill presents a naked case of breach of contract.”

* * * * *

“The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of con-

tracts, or deprive a citizen of property without due process of law.” (49 L. ed. at page 716).

(e) *Arizona Code Annotated, 1939, is a mere re-compilation of existing statutes.* The allegation that the Arizona Annotated Code of 1939, and the resolutions of the Board of Supervisors and the State Loan Commissioners adopted pursuant thereto, constitute laws impairing the obligation of the contract is wholly without merit as we have pointed out under the heading “The Fundamental Fallacy Underlying the Position of Appellants.” (supra pps. 14 to 22, inc.).

Neither the resolutions of the Loan Commissioners nor of the Board of Supervisors constitute laws of the State of Arizona in the sense in which that term is used in Article I, Section 10, Clause 1 of the Federal Constitution. Municipal ordinances or resolutions are not to be deemed “laws” within the constitutional prohibition which has application only to states unless the ordinances or resolutions are adopted under legislative authority of the State Legislature.

Hamilton Gas Light & Coke Co. v. Hamilton,
146 U.S. 258, 13 S. Ct. 90, 36 L. ed. 963.

*City of Louisville v. Cumberland Telephone
& Tel. Co.,* 155 Fed. 725, 12 Ann. Cas. 500;
appeal dismissed 212 U.S. 588, 53 L. ed.
662, 29 S. Ct. 690.

The only legislative acts of the State of Arizona which give vitality to the proceedings of the Board of Supervisors and the Loan Commissioners are the Laws of 1912 in existence at the time of the

Addendum, Page 28 (Brief for Appellees)

*New Orleans Water Works Co. v. Louisiana Sugar
Refining Co.,* 125 U.S. 18, pages 31-32, 31 L.ed.
607, page 612, 8 S.Ct. 741.

Supervisors and the Loan Commissioners constitute laws impairing the obligations of the contract falls of its own weight. The only law of the State of Arizona to which the impairment clause of the Federal Constitution may be directed is the law of 1913 as recodified in the Annotated Code of 1939; namely, the same identical law which was in effect at the time of the issuance of the Maricopa County Bonds. (First Maricopa Case, 125 P. 2d at page 707).

2. The decisions of the Supreme Court of Arizona in the First and Second Maricopa Cases and the decision of the Superior Court of Maricopa County in the Taxpayer's Suit are final, conclusive and binding.

(a) *State law determines what rights are created by state statutes.* The mere fact that a federal question is claimed in the Complaint does not give the Federal Courts jurisdiction or permit the Federal Courts to ignore the state law as decided by the State Courts. In citing *Appleby v. New York*, 271 U.S. 364, 70 L. ed. 992, 46 S. Ct. 569, Appellants omitted the only pertinent part thereof, viz., that in determining what rights of contract were created by state law, it is state law and not "Federal" law which controls:

" * * * The rights of the plaintiffs in error under the two deeds here in question with their covenants are to be determined then by the law of New York as it was at the time of their execution and delivery." (70 L. ed. at page 1000).

(b) (c). *The interpretation and effect given by the State Courts to the Statutes creating the contract is controlling.* Under these headings Appellants beg the question. They admit that the decision of the State Courts as to the interpretation and effect of

the law will be accepted. They overlook the fact that the State Courts did not determine any question of impairment or go back on their own decisions, but on the contrary consistently held at all times that the contracts were created by the laws in force at the time the bonds were issued; that such laws became a part of the bonds and constituted at that time, and do now constitute, the law of the State of Arizona, viz. "the law when the bonds in question were issued and under which they must be refunded" (125 P. 2d. at page 707). The inconsistency of Appellants' Brief is the more glaring in view of the statement which appears on page 53 of Appellant's Brief:

"It thus appears that the controversy involves principally the interpretation of the contract created by the issuance of the bonds which does not present a question of federal jurisdiction
* * * "

and the admission on page 63 of Appellants' Brief:

"The decision of the State Court as to the interpretation and effect of the law which it is charged impairs the obligation of a contract, will be accepted * * * "

We submit that there is here no controversy as to the meaning or effect of the contract created by the laws of 1913 in effect at the time the bonds were issued. The meaning and effect to be given to those laws was decided by the Supreme Court of Arizona in 1914, long prior to the issuance of the Maricopa Bonds, in *Board of Supervisors v. Hawkins*, 16 Ariz 16, 140 Pac. 821, as well as by the First and Second Maricopa Cases and by the Taxpayer's Suit. In *Toole County Irrigation District v. Moody*, supra, the same argument was made and answered.

“Appellees argue that to give effect to the Montana decisions would violate the Constitution by impairing the obligation of a contract, namely, the district’s obligation, the existence of which is here in dispute. Appellees’ argument assumes the existence of the obligation and thus begs the question, the question being whether or not the obligation exists. Whether it exists or not must be determined by the law of Montana as declared by the highest court of that State; which is to say, by the law of Montana as declared in *State ex rel. Malott v. Board of County Commissioners and Rosebud Land & Improvement Co. v. Carterville Irrigation District*. According to that law, the obligation which appellees say must not be impaired does not exist.” (125 F. 2d at page 501).

(d) *Arizona Code Annotated, 1939, is not a law impairing the obligation of Appellants’ contract.* No independent jurisdiction exists in the Federal Courts to determine the meaning or effect of an alleged contract where no question of impairment arises by reason of the absence of any subsequent statutory enactment of the State Legislature. The argument advanced under this heading is wholly fallacious. It is based upon the assumption, contrary to facts, that the decisions of the Arizona Courts gave effect to some subsequent law by the simple device of declaring that Appellants had no such contract as they now assert. The question of what that contract was does not depend on what Appellants assert, in the first place, and in the second place, as we have repeatedly pointed out, no subsequent legislation is involved. The only law involved is that which was in existence at the time the bonds were issued. The decisions in the First and Second Maricopa Cases show on their face that the statute

which the Arizona Court considered was the Revised Statute of 1913, and that the same law is now in effect, although codified as Arizona Code Annotated, 1939. (See *supra* pps. 14 to 22, inc., under the heading "The Fundamental Fallacy Underlying the Position of Appellants" etc.). There is no suggestion in the opinions of the Supreme Court of Arizona that the Annotated Code of 1939 added to, subtracted from, or in anywise changed, altered or modified the Revised Statutes of 1913.

Under similar circumstances the courts, both state and federal, have held expressly that subsequent codification or even amendments which effected no real change in the law are immaterial.

In *Garland Co. v. Filmer* (1932), 1 Fed. Supp. 8, the Federal Court held that the 1931 Amendment of the California Bridge and Highway District Act merely clarified the law, as the State Supreme Court had already held.

" * * * The California Supreme Court after a careful analysis of former section 21 and interpretation of that section in connection with other provisions of the act upon the same subject held that no substantial change was made by the act of 1931. It found that, under the original act, the primary obligation to meet the principal and interest of the bonded indebtedness was upon the taxpayers, and that the clauses referring to the payment of interest from the moneys obtained from the sale of bonds and the payment of both principal and interest from the revenues of the bridge at most created an ambiguity in the law. The amendment of 1931 did no more than clarify the ambiguity in the earlier law and declare the law as it previously existed. The Supreme Court in effect found

that without the amendment it would have construed the law as placing the full taxing power of the district behind the payment of principal and interest of the bonds. The Supreme Court was construing and interpreting the statutes of its own state and by that construction and interpretation this court is bound. Since there has been no actual change in the law, the obligation of the taxpayers towards the bonds has not been changed and there has been no impairment of the obligation of contracts by the act of 1931.” (1 Fed. Supp. at p. 15).

Cochran County v. Mann (1943) 172 S.W. (2d), 689.

From that case it appears that in 1924 and 1926 Cochran County issued bonds for the purpose of building a court house. These bonds contained no provision for their redemption prior to maturity. It was the attorney general’s opinion, therefore, that the county was without power to refund these bonds. The revised statutes of 1911 provided that “All bonds issued under this chapter . . . shall be redeemable at the pleasure of the county at any time after five years after the issuance of the bonds . . . ”

In holding that the refunding was authorized, the Supreme Court of Texas said, page 690:

“ * * * This same Article was brought forward as Article 720 as a part of Chapter 2, Title 22, in the recodification of 1925 in the same language, except that the word ‘shall’, which we have italicised, was changed to the word ‘may’. It has remained unchanged since that time. We consider that this change in the wording of the statute as brought about by the recodification in 1925, made no change in the meaning or effect

of the statute, and that it is therefore unimportant on the question here under consideration.

“The above statute, being in effect at the time the bonds were issued, was read into and formed a part of the contract, and purchasers of the bonds were charged with notice thereof and are presumed to have bought the bonds in recognition thereof. 1 Jones, Bonds and Bond Securities, 4th Ed., p. 590, par. 527.”

The true situation therefore is this:

Appellants “assert” that the contractual obligations existing at the time the bonds were issued should be construed in accordance with their assertions. The Arizona Courts have held otherwise. There is nothing to the point raised by Appellants other than to again reiterate that as the Supreme Court has many times decided, the “contract clause” of the Constitution is not addressed to the “impairment” of contract obligations, if any, as may arise by mere judicial decisions in the state courts without action by the legislative authority of the state.

Cross Lake Shooting & F. Club v. Louisiana,
224 U.S. 632, 56 L. ed. 924, 32 S. Ct. 577.

This was a suit by the state to recover land, conveyed to grantors of a gun club by a levee district, under a statute of 1892 which read in part that these lands were “hereby granted and donated” to the levee district.

In 1902 the legislature passed a statute authorizing the state land office to sell these same lands at a stated price, and purported to repeal the 1892 act.

In the State Supreme Court judgment was entered for the state upon the court’s construction of the Act

of 1892 as requiring that conveyances be executed before any title passed, contrary to the contention that the 1892 Act by its words "hereby granted" was a present grant of the title. Jurisdiction was claimed for the Federal Court upon the assertion that the 1902 statute impaired the obligation of the gun club's contract.

The U. S. Supreme Court rejected this contention and refused to construe the 1892 Act for itself, holding itself bound by the construction of the state court.

"But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that the court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired."

* * *

"What has been said sufficiently demonstrates that no effect whatever was given to the act of 1902, and therefore that the case presents no question under the contract clause of the Constitution; and, as there is no suggestion of the presence of any other Federal question, the writ of error is dismissed." (56 L. ed. at p. 928).

Tidal Oil Co. v. Flanagan, 263 U.S. 444, 68 L. ed. 382, 44 S. Ct. 197;

Frank v. Magnum, 237 U.S. 309, 344, 59 L. ed. 969, 35 S. Ct. 582.

(e) *The jurisdictional allegations are frivolous.* Appellants' claim set up in the Amended Complaint is not substantial and is not made in good faith. Accordingly, the United States District Court had no jurisdiction under Section 41, Title 28, U.S.C.A.

Appellants admit that all of the cases cited in their brief involve writs of error to the Supreme Court of the United States under Section 344, Title 28, U.S.C.A. (Brief for Appellants, page 82.) They seek to differentiate the cases which they rely upon from the present suit by alleging that this suit was brought in the Federal Court in the first instance and that a sufficient claim of impairment can be made by mere assertion in the complaint wholly unsupported by the record. Such is not the rule. On the contrary, where the jurisdiction of the District Court is originally invoked, federal jurisdiction must appear from plaintiff's own statement of his claim; that is

“a statement of facts in legal and logical form such as is required in good pleadings.”

Carson v. Dunham, 121 U.S. 421, 7 S. Ct. 1030, 30 L. ed. 992;

Boston Consolidated Copper Co. v. Montana Ore Purchasing Co., 188 U.S. 632, 23 S. Ct. 434, 47 L. ed. 626;

South Covington Street Ry. Co. v. City of Newport, 259 U.S. 97, 42 S. Ct. 418, 66 L. ed. 842;

Hull v. Burr, 234 U.S. 712, 34 S. Ct. 892 58 L. ed. 1557.

The mere averment of a Federal question is not sufficient where the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason.

Fayerweather v. Ritch, 195 U.S. 276, 25 S. Ct. 58, 49 L. ed. 193;

O'Callaghan v. O'Brien, 199 U.S. 89, 25 S. Ct. 727, 50 L. ed. 101;

Underground Railway Co. v. New York,
193 U.S. 416, 48 L. ed. 733, 24 S. Ct. 494;

New Orleans v. New Orleans Water Works Co., 142 U.S. 79, 12 S. Ct. 142, 35 L. ed. 943;

Swafford v. Templeton, 185 U.S. 487, 22 S. Ct. 783, 46 L. ed. 1005.

Accordingly it is obvious from the face of the complaint that there is no point of controversy here involved except that appellants disagree with the interpretation of state law by the Supreme Court of Arizona and seek in this court to have this case retried.

3. *Eric Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, is conclusive upon all questions arising herein.

By their own admission Appellants concede that nothing is involved other than the interpretation of the state law creating the contract between Maricopa County and the bondholders (Brief of Appellants page 53). The law of the state in existence at the time the bonds were issued created the "obligation" of those contracts.

In *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 55 Sup. Ct. 555, 79 L. ed. 1298, the Court said, at page 1301 of 79 L. ed:

"To know the obligation of a contract we look to the laws in force at its making."

In *Home Building & Loan Asso. v. Blaisdell*, 290 U.S. 398, 54 Sup. Ct. 231, 78 L. ed. 413, it is stated at page 424 of 78 L. ed:

"The obligation of a contract is 'the law which binds the parties to perform their agreement.'

Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L. ed. 529, 549, Story op. cit. §1378. This court has said that ‘the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement . . .’

12 Am. Jur. Const. Law § 386 p. 14-15.

This was so held in the First Maricopa Case. The only question is: What was the state law at the time the bonds were issued? That question has been answered.

Erie R. R. Co. v. Tompkins, 304 U. S. 64;
82 L. ed. 1188, 58 S. Ct. 817.

“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general’, be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal Courts. * * * ”

See also:

Oklahoma Packing Co. v. Oklahoma Gas and Electric Co., 309 U.S. 4; 60 Sup. Ct. 215, 84 L. ed. 537;

Six Companies of California v. Joint Highway District, 311 U.S. 180, 61 S. Ct. 186, 85 L. ed. 114;

Stoner v. New York Life Insurance Co.,
311 U.S. 464, 85 L. ed. 284, 61 S. Ct. 336;

Fidelity Union Trust Co. v. Field, 311 U.S.
169, 85 L. ed. 109, 61 S. Ct. 176;

West v. American Tel. & Tel. Co., 311 U.S.
223, 85 L. ed. 139, 61 S. Ct. 179;

Toole County Irrigation District v. Moody,
125 F. (2d) 498.

4. *The State of Washington has no priority rating.*

The theory advanced by Appellants that notwithstanding the rule in *Erie Railroad Co. v. Tompkins*, *supra*, the State of Washington, as a simple plaintiff in the Federal Court, is nevertheless endowed by virtue of its statehood with the sole and exclusive right to have its cause determined by what the Supreme Court has said no longer exists; namely, the Federal General Common Law (or as it has been better termed, the "Brooding Omnipresence in the Sky"*) is admittedly novel, but wholly without merit.

The law, and the only law, to be applied in this case is the law of the State of Arizona.

West v. American Telephone & Telegraph Co., 311 U.S. 223, 85 L. ed. 139, 6 S. Ct. 179.

"State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it might appear from the view-

*Mr. Justice Holmes, dissenting, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, page 222; 61 L. ed. 1086; 37 Sup. Ct. 524.

point of 'general law' and however much the state rule may have departed from prior decisions of the federal courts." (85 L. ed. at p. 144.)

Fidelity Union Trust Co. v. Field, 311 U. S. 169, 85 L. ed. 109, 61 S. Ct. 176.

"The highest state court is the final authority on state law (*Beals v. Hale*, 4 How (US) 37, 54, 11 L. ed. 865, 872; *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. ed. 1188, 1194, 58 S. Ct. 817, 114 ALR 1487), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State." (85 L. ed. at p. 112).

Section 34 of the Judiciary Act of 1789 provides that "the laws of the several states, except where the Constitution, Treaties or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." (28 U.S.C.A. section 725).

The State of Washington as a plaintiff in the lower Federal Court stands in no different position than a citizen of any other state, except that independently of its joinder with the Equitable Life Insurance Company it would have no standing in the Federal Court for a state, as such, is not a "citizen" and cannot sue upon the grounds of diversity of citizenship. (*Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482, 15 S. Ct. 192, 39 L. ed. 231; *Ames v. Kansas*, 111 U.S. 449, 4 S. Ct. 437, 28 L. ed. 482; *Stone v. South Carolina*, 117 U.S. 430, 29 L. ed. 962, 6 S. Ct. 799; *People v. Bruce* (C.C.A. 9, 1942) 129 F. 2d 421; *Fowler v. California Toll Bridge Authority* (C.C.A. 9, 1942) 128 F. 2d. 549).

Furthermore, the State of Washington has no standing in this case for it is obvious from the face of the record that the State of Washington was included as a party plaintiff only to give "color" to the otherwise untenable claim of the other bondholder. The State of Washington had the unquestioned right to sue the State of Arizona in the Supreme Court of the United States. It may be pertinent to ask why the State of Washington did not avail itself of this remedy. The answer is obvious. The mere unsubstantiated allegations of the complaint afford no color of right and any suit filed by the State of Washington would have been dismissed by the Supreme Court of the United States as wholly without merit. The rule is so well settled that where in a proper case a state is entitled to seek redress in the Federal Court on a contract which it claims to have been impaired or breached, it is regarded *pro hac vice* as a private person itself, and is bound accordingly.

Davis v. Gray, 83 U.S. 203, 16 Wall. 203, 21 L. Ed. 447.

"When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. *When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.*" [Emphasis ours.] (21 L. ed. at p. 457).

Hall v. Wisconsin, 103 U.S. 5, 26 L. ed. 302.

"When a State descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly." (26 L. ed. at p. 305)

Newton v. Mahoning County, 100 U.S. 548,
25 L. ed. 710.

“Undoubtedly, there are cases in which a state may, as it were, lay aside its sovereignty and contract like an individual, and be bound accordingly. *Curran v. Arkansas*, 15 How., 304; *Davis v. Gray*, 16 Wall, 203 [83 U.S. XXI, 447].

“The cases in which such contracts have been sustained and enforced are very numerous.” (25 L. ed. at p. 710).

See also:

Piqua State Bank of Ohio v. Knoop, 57
U.S. 369, 16 How. 369, 14 L. ed. 977.

Rorick v. Bd. of Commissioners, 57 F. (2d)
1048.

II

THE STATUTES OF ARIZONA IN EFFECT WHEN THE MARICOPA BONDS WERE ISSUED SPECIFICALLY PROVIDED THAT THE BONDS WERE SUBJECT TO REDEMPTION WHENEVER BONDS ISSUED BY THE LOAN COMMISSIONERS COULD BE SOLD AT A LOWER INTEREST RATE AND THE PROCEEDS OF SALE APPLIED TO THE CALL AND REDEMPTION OF THE COUNTY BONDS.

1. *The Arizona Statutes of 1913 authorize specifically the redemption of County bonds.*

Appellants not only have misunderstood the decisions of the First and Second Maricopa Cases, but have failed to apply even the ordinary rules of statutory construction. Section 5260, Arizona Revised Statutes of 1913, requires the Loan Commis-

sioners to provide for the redemption of county indebtedness in the same manner as other state indebtedness. Section 5252 of the Arizona Revised Statutes of 1913 provides that state indebtedness shall be subject to call for redemption whenever the Loan Commissioners can issue refunding bonds at a lower rate of interest. Section 5258 of the Arizona Revised Statutes of 1913 provides for the publication of notice of call and redemption upon receipt by the Treasurer of the proceeds of sale of the refunding bonds. These are the usual and customary provisions found in similar statutes all of which have been held to authorize the call and redemption of bonds in accordance with their terms.

Catholic Order of Foresters v. State of North Dakota, 67 N.D. 228, 271 N.W. 670, 109 A.L.R. 979 (note p. 988) ;

National Bank of Republic v. City of St. Joseph, 31 F. 216 ;

Neighbors of Woodcraft v. Rupert, 51 Ida. 215, 4 P. 2d 360 ;

Roberts & Co. v. City of Paducah, 95 F. 62 ;

Board of Commissioners of Harmon County v. R. L. Edwards, 140 Okl. 247, 282 Pac. 1090 ;

Dupont v. Mills, 39 Del. 42, 196 Atl. 168.

There are three well defined methods of providing for the call and redemption of bonds.

First, a provision may be inserted in the form of bonds actually issued, providing for prior call and redemption without any statutory authority whatsoever.

Stewart v. Henry County, 66 Fed. 127.

Second, the statute under which the bonds are issued may contain a clause providing for the call and redemption of the bonds prior to their maturity, although neither the statute nor the right to call the bonds may be referred to on the face of the bonds themselves. Even under such circumstances the statute, as such, becomes a part of the contract of the bonds and is binding upon the bondholders.

National Bank v. St. Joseph, 31 Fed. 216.

Third, the statute authorizing the issuance of the bonds may contain provision for the prior redemption of the bonds either expressly or upon the happening of certain contingencies set forth in the statute, which is referred to in the bonds by reference only to the statute, but without reference to the specific provisions authorizing the prior redemption of the bonds, and such statute becomes a part of the bond contract and is binding upon the bondholder.

Catholic Order of Foresters v. State of North Dakota, 67 N.D. 228, 271 N.W. 670;

Neighbors of Woodcraft v. Rupert, 51 Ida. 215, 4 P. 2d 360;

Note, 109 A.L.R. 988.

Such is in fact the Arizona Statutes of 1913 and so construed in both the First and Second Maricopa Cases as well as in the Taxpayer's Suit.

The provisions for accelerating the maturity of the outstanding bonds to be refunded under the terms of the 1913 Revised Statutes are no different from the customary and usual provisions found in corporate trust indentures for the acceleration of the out-

standing bonds issued thereunder upon the happening of certain events of default specified therein.

19 *Fletcher, Cyclopedia Corporations*, pp. 358-359, § 9136:

“It is, therefore, the practice to provide that upon the happening of such a default and its becoming absolute on the expiration of the period of grace, the trustee shall have the right and, if properly requested, the duty to accelerate the payment of the principal by declaring the whole amount of the indebtedness to be due and payable immediately. This power is generally granted to the trustee in the alternative. It may make such a declaration on its own motion. It is required to make the same on written request being filed with it signed by the holder of a certain proportion of the outstanding bonds, and upon receiving proper indemnity. The percentage of bonds which may demand such action varies in different mortgages, being as low as ten per cent in some mortgages and as high as fifty per cent in others, the most usual figure being twenty-five per cent. * * * The more usual form reads substantially as follows:

“ ‘Then and in every such event the Trustee may, and upon the written request of the holders of not less than twenty-five per cent in aggregate principal amount of the bonds then outstanding hereunder and upon being indemnified to its satisfaction, shall, by notice in writing to the company, declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately, and upon any such declaration the said principal shall be and become due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding.’ ”

Brinsmade v. Johnson (1915), 192 Mo. A
684, 179 S. W. 967:

“By article 7 of the mortgage, it is stipulated that in case default shall be made in the payment of any interest accruing upon any one or more of the bonds hereby secured according to the terms thereof on any day when the same shall become due, and such default shall continue for six months or in case the elevator company shall neglect to pay any tax or assessment levied against its property for a period of six months after the same shall have fallen into arrears, or shall fail to keep its property insured against loss by fire, or shall fail to pay the rent of any leasehold property conveyed in accordance with article 3 of the mortgage, then, and in any such case, the trustee may enter and take possession etc. By article 8 of the mortgage it is provided that if any such continuous or other default on the part of the elevator company as mentioned in Article 7 thereof or in case the elevator company shall make default in performance of any of the provisions of the indenture, then, and in any such case, if the holders of the majority in amount of the then outstanding bonds secured so elect and shall notify the trustee in writing of such election, ‘the whole of the principal of all bonds hereby secured or intended so to be and then outstanding shall forthwith be declared by the trustee to be and it shall immediately thereupon become due and payable, anything herein or in said bonds to the contrary notwithstanding.’ ” (179 S.W. at pp 967-968).

* * * * *

“By these apt words of reference the provisions of the mortgage designed to accelerate enforcement through precipitating maturity of the principal debt on the default stipulated after six months’ time are imported therein so as to mature the entire principal of the bond on

the trustee's declaring such when moved by two-thirds in amount of the bondholders." (179 S.W. at p. 969).

* * * * *

"In such cases, where the provisions of the mortgage are imported into it by apt reference, the purchaser of the bond is deemed to take with notice of such provisions of the mortgage duly recorded, and not as an innocent purchaser of an ordinary promissory note secured by deed of trust which contains no such provision in the face of the note." (179 S.W. at p. 969).

Also:

Connell v. Kaukauna Gas, Electric Light and Power Co. (1916) 164 Wis. 471, 159 N.W. 927;

Munch v. Central West Public Service Co. (1935), 128 Neb. 645, 259 N. W. 736;

Scholzer et al. v. Heckeroth et al. (1928), 174 Minn. 525, 219 N.W. 921.

In holding the Maricopa County bonds subject to redemption, it will be noted that the Supreme Court in the Second Maricopa Case reviewed its prior holding and reached the same conclusion.

Second Maricopa Case, 136 P. 2d 270, at 271-2:

"The first proposition advanced is that none of the highway bonds are subject to redemption at the option of Maricopa County, or upon call of the loan commissioners, prior to their fixed maturity date, and if the State of Arizona refunding bonds were issued at this time, long prior to the fixed maturity dates of the county highway bonds, the taxpayers of Maricopa County would be compelled to pay interest both on the county highway bonds and also on

the refunding bonds. If we cannot stop interest from running on the outstanding county bonds, no benefit or profit will result to the county from the issuance of the state refunding bonds. This question is answered by the opinion in the case of *Maricopa County v. Osborn*, supra, wherein we said:

“ ‘This being true, any bonds in Arizona, issued while this provision was a part of its statutory law, to take care of the indebtedness specified therein, were redeemable and refundable whenever state bonds could be issued at a rate of interest sufficiently lower than that previously paid to render it profitable and beneficial to the state to issue them. This portion of 5252, whether contained in such bonds or not, becomes as much a part of them when issued as it does if incorporated in them and is binding upon the holders thereof as well as the state. *National Bank of Republic v. City of St. Joseph*, C.C., 31 F. 216; *Miners’ & Merchants’ Bank v. Herron*, 46 Ariz. 71, 47 P. 2d 430; *Catholic Order of Foresters v. State of North Dakota*, 67 N.D. 228, 271 N.W. 670, 109 A.L.R. 979; *Roberts & Co. v. City of Paducah*, C.C. 95 F.62; *Board of Commissioners of Harmon County v. R. J. Edwards*, 140 Okl. 247, 282 P. 1090.’ ”

2. *The historical origin of Ch. 1, Title 52, Revised Statutes of 1913, demonstrates that all bonds issued thereunder were subject to call and redemption.*

Examination of the origin of Chapter 1, Title 52 of the Revised Statutes of 1913 and of the predecessor territorial laws and Acts of Congress shows clearly that the county bonds were subject to redemption whenever bonds of the Loan Commissioners were authorized to be issued and notice of redemption duly published.

(a) *The Act of Congress of June 25, 1890 was amended particularly to cover the subject of refunding.* The argument of Appellants on this score wholly ignores the course and effect of the territorial legislation authorizing the refunding of the outstanding territorial and county debts. The original act authorizing the refunding of the outstanding debts was not the Congressional Act of June 25, 1890, as Appellants erroneously believe, but the Territorial Act of 1887 (*Murphy v. Utter*, 186 U.S. 95, 46 L. Ed. 1070, 22 S. Ct. 776). Provision for the payment of the outstanding indebtedness of the counties was particularly enacted by Act of Congress of 1896 (29 Stat. at L. 262, Ch. 339). This amendment was made for the very purpose of refunding the county debt. [See 46 L. ed. 1075-6].

In any event the provisions of the territorial and congressional enactments are wholly immaterial since when Arizona became a state the Revised Statutes of 1913 became the law of the State of Arizona as such irrespective of the provisions of any law from which it was borrowed or upon which it might have been based.

(b) *The Revised Statutes of 1913 constituted a new law of the State of Arizona.* In any event the antecedent statutes upon which the Revised Statutes of 1913 of Arizona were based specifically authorized the redemption of county bonds prior to their fixed maturity dates. This was in effect held by the Supreme Court of the United States in *Schuerman v. Territory of Arizona*, 184 U.S. 342, 46 L. ed. 580, 22 S. Ct. 406, in which the court held that the holders of outstanding county bonds had the absolute right to compel the refunding of their bonds even against the objection of the county officials. The decisions

of the territorial courts were to the same effect. In *Yavapai County v. McCord*, 6 Ariz. 423, 59 Pac. 99, the court said:

“ * * * A demand from the holders alone upon the Loan Commissioners for the funding of these Yavapai County Railroad Bonds would have been sufficient, in itself, to have entitled the holders to an exchange of such bonds for territorial funding bonds, and this seems to have been the view taken of these provisions of the law by the Supreme Court of the United States in *Utter v. Franklin*.” (172 U.S. 416, 43 L. ed. 498, 19 S. Ct. 183). (59 Pac. at p. 101).

Appellants appear to argue that the Congressional Act of June 25, 1890 was the same law as the Revised Statutes of 1913. This is incorrect. The Congressional Act was several times amended subsequent to 1890 and never, as such, became the law of the State of Arizona. When the new statutes, viz., the Revised Statutes of 1913 were adopted, the Supreme Court of Arizona gave to this new enactment, long prior to the issuance of any Maricopa County Bonds, the same construction which it later expressed in the First and Second Maricopa Cases.

Board of Supervisors v. Hawkins (May 16, 1914) 16 Ariz. 16, 140 Pac. 821.

The statement on page 104 of the Brief for Appellants that the Supreme Court of Arizona erred in construing the statute for the asserted reason

“it not being advised of the origin of the statute in that case”

is a statement contrary to the facts. The Supreme Court of Arizona had before it the able brief of Messrs. Cox & Cox reviewing all of the earlier stat-

utory history antecedent to the Revised Statutes of 1913.

(c) *Chapter 1, Title 52, of the Revised Statutes of 1913, was not repealed by Chapter 2, Title 52 of the same Statutes.* The argument that Chapter 1, Title 52, Revised Statutes of 1913 was repealed by Chapter 2, Title 52, of the Revised Statutes of 1913 is without merit in the light of the decisions of the Supreme Court of Arizona in both the First and Second Maricopa Cases. The same argument was made by Mr. Gust in his amicus curiae brief on file in the First Maricopa Case (R 95-113); however, in his argument before the Supreme Court of Arizona in the First Maricopa Case, Mr. Gust admitted that it was

“ * * * hard to say which of the two chapters is the later enactment. Be that as it may, the later act did not comply with the constitutional provision for amending the prior act and, hence, ought not to be construed as having the effect of amending the prior act, if that can be avoided. * * * Lastly, the provisions of all of the original acts were inserted in the revisions of 1913 and 1928 and by reason of such insertion in such revisions both chapters must be given effect as far as possible on the presumption that the legislature intended that each should be preserved to operate in its particular field.” (R 110-11).

On this point the decisions of the Arizona Court are conclusive.

3. *No valid reason exists for questioning the right of redemption of the Maricopa County Bonds and the arguments advanced by Appellants are specious.*

The reasons advanced by Appellants against the construction of the refunding provisions of Chapter 1, Title 52, Revised Statutes of 1913, contrary to the decisions of the Arizona Courts, are specious and without merit. This appeal constitutes nothing more than an attempt by Appellants to have the Federal Courts retry the same issues that were tried and decided by the courts of Arizona.

(a) *Chapter 1, Title 52, Revised Statutes of 1913, specifically applies to all bonds issued subsequent to 1913.* Irrespective of the provisions of the original Act of Congress of June 25, 1890, the Arizona Statutes specifically provide for the refunding and redeeming of future indebtedness. Section 5251 of the Revised Statutes of Arizona, 1913, provides for the refunding and redemption of outstanding indebtedness

“and such future indebtedness as may be or is now authorized by law.”

The words “*such future indebtedness as may be authorized by law*” in themselves are sufficient to show the intent of the Legislature of the State of Arizona to provide for the refunding of any indebtedness incurred subsequent to the enactment of the statute, and this was the holding of the Supreme Court of Arizona on May 16, 1914, in *Board of Supervisors v. Hawkins*, 16 Ariz. 16, 140 Pac. 821. Furthermore Section 5252 of the Revised Statutes of 1913 makes it the duty of the Loan Commissioners to provide for the payment of indebtedness

“ * * * that is now, or may hereafter be authorized by law.”

The provisions of Section 5260 of the Revised Statutes of 1913, authorizing the refunding and re-

demption of county bonds in the same manner as other state indebtedness, brings into effect the operative provisions of Sections 5251 and 5252 of the Revised Statutes of Arizona, and was so construed by the Supreme Court of Arizona in both the First and Second Maricopa Cases, as well as in the Taxpayer's Suit.

The use of the words "allowed by law" was considered in the First Maricopa Case, 125 P. 2d 703, at page 706, wherein the Supreme Court stated:

" * * * Under this provision there is no difference in the matter of refunding between the indebtedness of the state and the indebtedness of the county which includes 'any indebtedness now allowed, or that may be hereafter allowed by law', that is, any that has been fixed or established, and not merely that which has matured, or became redeemable at the option of the board of supervisors upon the expiration of a specified number of years."

(b) *The Congressional Act of June 25, 1890, did not pledge the credit of the State (and neither did the Revised Statutes of 1913) in violation of any constitutional requirement.*

The argument that it was the intent of Congress in the Act of June 25, 1890, to provide for the refunding and redemption of county indebtedness by the issuance of territorial bonds in violation of the Constitution, is without merit. Bonds issued under the old territorial laws remained debts of the counties. The same is true of bonds issued under the Revised Statutes of 1913. The point has already been put at rest by prior decisions of the Supreme Court of Arizona.

Boyce v. Pima County, 24 Ariz. 259, 208 Pac. 419, 421:

“The fact that the territory of Arizona had taken up such bonds and issued to the holders thereof territorial bonds did not relieve the county from the obligation to care for said indebtedness. As a matter of fact, the different counties, as they had done before, after the refunding, continued to levy and collect taxes, to discharge the interest. The substitution of bonds of the territory for bonds of the counties did not, in fact, substitute debtors. The counties were still the debtors, obligated to pay the debts.”

First Maricopa Case, 125 P. 2d, 703, at pp. 707-8 (holding likewise with respect to bonds issued under the Revised Statutes of 1913 as codified in the Annotated Code of 1939).

(c) *The Revised Statutes of 1913 have been uniformly construed to authorize the refunding of county bonds.* The long continued construction of the Revised Statutes of 1913 is the clearest indication that the Supreme Court of Arizona was correct in its construction of the statutes in both the First and Second Maricopa Cases and likewise the construction placed upon the statutes by the District Court of the United States and by the Superior Court of Maricopa County in the Taxpayer's Suit was correct. These decisions are based upon and stem from the earliest decisions of the old territorial laws by the Supreme Court of the United States.

In *Schuerman v. Territory of Arizona*, 184 U.S. 342, 46 L. ed. 580, 22 S. Ct. 406, the Supreme Court of the United States held that county bonds became due and payable and must be refunded whenever the bondholders so demanded.

In *Boyce v. Pima County*, 24 Ariz. 259, 208 Pac. 419, the court held that upon such redemption and refunding of the outstanding bonds, the bonds issued by the Loan Commissioners still remained debts of the county whose bonds had been refunded.

In *Board of Supervisors v Hawkins*, 16 Ariz. 16, 140 Pac. 821, at page 823, the court found specifically that the county bonds could be refunded at any time by the issuance of bonds by the Loan Commissioners.

The First and Second Maricopa decisions are based upon and follow necessarily these earlier rulings.

(d) *No subsequent legislation of Arizona supports the erroneous position of Appellants.* In their argument under this heading, Appellants go round a circle. They argue that because other statutes of the Legislature of Arizona authorized the refunding of county bonds under other circumstances, the court is deprived of the right to consider the Statutes of 1913 or to give effect thereto. Such is not the law. The fact that other statutes exist under which the county bonds may be refunded is wholly immaterial. Where several statutes exist, each authorizing and permitting a separate procedure to be followed, the county authorities may exercise their unquestioned right to adopt any one of the statutes which they deem to be to their best interests.

However, the practical construction of the statutes by Arizona attorneys is conclusive evidence that the Revised Statutes of 1913 have been considered as authorizing the refunding of bonds of cities, counties and municipalities even prior to the First and Second Maricopa Cases. Prior to the ren-

dition of the First Maricopa Case, the Town of Miami, Gila County, Arizona, had already completed its proceedings for the refunding of \$330,000 principal amount of bonds.*

Likewise, prior to either the First or Second Maricopa Cases, the City of Nogales refunded its bonds by the issuance of refunding bonds by the Loan Commissioners under the Revised Statutes of 1913, as carried forward into the Annotated Code of 1939.

(e) *Chapter 1, Title 52, Revised Statutes of 1913, applies to all bonds issued after its effective date.* Chapter 1, Title 52 of the Revised Statutes of 1913 is clearly operative upon all bonds of counties, cities and school districts issued thereafter and while the statute was in effect.

In attempting to build up an argument that the Revised Statutes of 1913 should be operative only on bonds which were outstanding as of June 25, 1890, the date of re-enactment of the Act of Congress, Appellants have only confused themselves. It is immaterial that the Act of Congress of June 25, 1890, applied only to bonds which were outstanding on the date of its enactment. That act was subsequently amended. See *Murphy v. Utter*, supra [46 L. ed. at pp. 1075-1076]. When the Revised Statutes of 1913 were enacted, Arizona had become a state and the Statutes of 1913 take effect as statutes of the State

*The opinion of J. L. Gust, dated January 10, 1942, covering these bonds reads in part (after describing the issue):

“From such examination, we are of the opinion that under the laws of the State of Arizona, the State Loan Commissioners of the State of Arizona are empowered to refund indebtedness of the Town of Miami, and that such proceedings comply with the laws of the State of Arizona.”

of Arizona from the date of their enactment. The bonds of Maricopa County which are sought to be redeemed were not issued prior to 1913. On the contrary, they were issued in 1919 and 1921, respectively, and while the Statutes of 1913 were in effect. They were therefore issued in accordance with the Statutes of 1913 and incorporated by reference the Revised Statutes of 1913 in the obligations of the bonds.

First Maricopa Case, 125 P. 2d 703, at page 705:

“ * * * This being true, any bonds of Arizona, issued while this provision was a part of its statutory law, to take care of the indebtedness specified therein, were redeemable and refundable whenever state bonds could be issued at a rate of interest sufficiently lower than that previously paid to render it profitable and beneficial to the state to issue them. This portion of 5252, whether contained in such bonds or not, becomes as much a part of them when issued as it does if incorporated in them and is binding upon the holders thereof as well as the state.”

There is not one word in the Revised Statutes of 1913 which would attempt to limit it to bonds which were outstanding on June 25, 1890. On the contrary, the rule is of universal application that statutes have a prospective and not retroactive operation.

Bartlett v. MacDonald (1915) 17 Ariz. 194, 149 Pac. 752, where the court said at page 752:

“ * * * It is a well grounded and settled rule that statutes will not be given a retroactive effect unless it clearly appears that the Legislature so intended, and even then the intention must be manifest or the exigencies of the case

compelling. When not otherwise indicated, the fair and reasonable assumption is that the intention of the lawmaker was that the statute should be prospective.”

See also:

Cummings v. Rosenberg, (1909) 12 Ariz. 327, 100 Pac. 810;

2 *Lewis' Sutherland Statutory Construction*, p. 641, §335;

Brewster v. Gage (1929) 280 U.S. 327, 74 L. ed. 457, 463, 50 S. Ct. 115.

(f) *All existing statutes in effect when the Maricopa County Bonds were issued became a part thereof.* The provisions of Chapter 1, Title 52, Revised Statutes of 1913, were incorporated by reference and became a part of all county bonds issued under the provisions of Chapter 2, Title 52, Revised Statutes of 1913.

Notwithstanding the form of bonds which expressly incorporated by reference all of the provisions of the laws of Arizona in existence at the time of their issuance, Appellants still maintain that the provisions of Chapter 1, Title 52, Revised Statutes of Arizona, 1913, were not a part of the bonds. The argument is supported by no facts and is contrary to the universal rule. The facts are that the bonds of Maricopa County specifically incorporated all laws in existence at the time of their issuance. Thus the issue of 1919 specifically provided:

“This bond is issued by the Board of Supervisors of said County of Maricopa, for the purpose of constructing and improving public highways within and for the said County of Maricopa, pursuant to and in strict compliance with

the Constitution of the State of Arizona *and the statutes thereof*, including *among others* Chapter II of Title LII of the Revised Statutes of Arizona, 1913, Civil Code, and Chapter 31 of the Session Laws, Regular Session 1917, and acts amendatory thereof and supplementary thereto." (R 60). [Emphasis ours].

The bonds issued in 1921 specifically provided on their face:

"This bond is issued by the Board of Supervisors of said County of Maricopa, for the purpose of constructing and improving public highways within and for the said County of Maricopa, pursuant to and in strict compliance with the Constitution of the State of Arizona, *and the statutes thereof* including *among others* Chapter II of Title LII of the Revised Statutes of Arizona 1913, Civil Code and Chapter 31 of the Session Laws of Arizona, Regular Session, 1917, and acts amendatory thereof and supplementary thereto. * * * " (R 64). [Emphasis ours].

It is a rule of universal construction that all statutes in existence at the time of the issuance of bonds become a part thereof and are incorporated therein whether expressly referred to or not.

1 *Jones, Bonds and Bond Securities* (4th Ed.) § 438, pp. 475-476.

(g) *Chapter 1, Title 52, Revised Statutes of 1913, expressly provides for the call and redemption of county bonds.* Section 5260 of Chapter 1, Title 52, Revised Statutes of 1913, specifically provides that the bonds of counties, municipalities and school districts shall be redeemable and refundable in the same manner as other state indebtedness. The meth-

od of redeeming and refunding state indebtedness is by specific reference incorporated in and made applicable to all county, municipal and school district indebtedness. Accordingly, all county bonds issued at the time the statute was in effect, viz: subsequent to 1913, have, by virtue of the incorporation of the provisions of the statute into the terms and conditions of the bonds, been made subject to redemption upon publication of the notice of redemption in the same manner as state indebtedness is subject to redemption. The First and Second Maricopa Cases are conclusive and are in accordance with the universal rule. (*Note, 109 A.L.R. 988*).

The right to redeem the county bonds having been given by the statutes in effect at the time of their issuance cannot be waived.

Catholic Order of Foresters v. State of North Dakota, 67 N.D. 228, 271 N.W. 670, 109 A.L.R. 979, page 985.

(h) *Subsequent validation of the County Bonds is immaterial and did not abrogate the right of redemption.* The fact that the Maricopa County Bonds were validated is wholly immaterial. It is clear that when the Maricopa County Bonds were issued in 1919 and 1921, respectively, grave doubts existed as to the legality of the issuance of the bonds. Litigation was actually instituted in the courts of the State of Illinois to test the legality of the issuance and sale of the bonds and it was for this reason, and this reason only, that the validation acts were adopted. (Brief of Appellants, Appendix, Exhibits J and K, pages XLVI-LI). The most that can be said is that had it not been for the validating acts a question might have been raised as to whether or not the

Maricopa Bonds could have been refunded. Having been validated and declared to be valid and legally binding obligations of Maricopa County, the right to refund the bonds has been clearly established, as was the case in *Murphy v. Utter*, 186 U.S. 95, 46 L. ed. 1070, 22 S. Ct. 776, where the bonds of Pima County, Arizona, were held subject to refunding by the issuance of bonds by the Loan Commissioners after they had been validated by appropriate legislation declaring them to be valid obligations.

See also:

Territory v. Vail, 10 Ariz. 138, 85 Pac. 652,
at page 653;

Yavapai County v. McCord, 6 Ariz. 423.
59 Pac. 99.

wherein it was specifically held that the county bonds having been validated, they were then subject to refunding by bonds issued by the Loan Commissioners.

Utter v. Franklin, 172 U.S. 416, 43 L. ed.
498, 19 S. Ct. 183,

wherein it was held that bonds which had previously been held void, but which were subsequently validated by validating legislation, were subject to refunding by the issuance of bonds by the Loan Commissioners.

Coconino County v. Yavapai County, 5
Ariz. 385, 52 Pac. 1127.

A validating act operates only to *cure* defective proceedings, not to change the rights of the taxpayers or bondholders.

6 *McQuillin, Municipal Corporations*
(2nd Ed.) p. 227.

See, also:

Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 660, 161 Pac. 113;

Los Angeles County Flood Control Dist. v. Hamilton, 117 Cal. 119, 169 Pac. 1028.

We have pointed out above that the County could not waive its right to redeem its outstanding bonds, and nothing in the bond purchase contract could change or alter the law in existence, viz, the Revised Statutes of 1913.

Meyerfeld v. South San Joaquin Irrigation District, 3 Cal. 2d 409, 45 P. 2d 321.

(i) *Negotiability does not affect the right to redeem the County bonds.* The argument of Appellants that the bonds of Maricopa County are negotiable instruments and not subject to prior redemption is sufficient in itself to show the desperation of Appellants' position. The rule is too clear to admit of argument.

Bond & Goodwin v. DuPont, 254 App. Div. 543, 5 N.Y.S. (2d) 423:

“ * * * The sellers did deliver with the instrument certain legal opinions but they were delivered as opinions and as the ground for the belief in the sellers as to when the instrument was due. But the party negotiating the instrument does not warrant that there can be no acceleration of the due date of the instrument by operation of law.”

Ackley School District v. Hall, 113 U.S. 135, 28 L. ed. 954, 5 S. Ct. 371;

Otis v. Cullum, 92 U.S. 447, 23 L. ed. 496.

(j) *The County is not estopped from redeeming its outstanding bonds.* The contention that Maricopa County is estopped from redeeming and refunding its outstanding bonds is frivolous. The bonds on their face show that they are issued under and in accordance with the provisions of the laws of the State of Arizona in effect at the time the bonds were issued. Even a cursory examination of the face of the bond would have indicated to any owner or holder that it was subject to call and redemption in the manner provided by law. Furthermore, the Supreme Court of Arizona had held in 1914, 5 and 7 years, respectively, prior to the issuance of the Maricopa County Bonds, that the county bonds were subject to redemption through the issuance of bonds of the State Loan Commissioners.

Board of Supervisors v. Hawkins (May 16, 1914), 16 Ariz. 16, 140 Pac. 821.

Moreover, as pointed out above, where the bonds were issued under the statutes in existence at the time of their issuance, which required their redemption, the Board of Supervisors of Maricopa County had no authority to issue bonds in any other manner, or, in fact, to issue bonds which were not subject to redemption through the issuance of bonds by the Loan Commissioners.

Catholic Order of Foresters v. State of North Dakota, 67 N.D. 228, 271 N.W. 670, 109 A.L.R. 979.

4. *The decisions of the Supreme Court of the State of Arizona in the First Maricopa Case and the Second Maricopa Case, and the decision of the Superior Court of Maricopa County in the Tax-*

payer's Suit, are final, conclusive and binding upon all questions involving the law of Arizona.

(a) *Proceedings in mandate are entitled to full faith and credit.* Under Point III in answer to the contentions of Appellants, we will demonstrate that the First and Second Maricopa Cases and the Taxpayer's Suit are *res judicata*, final, conclusive and binding upon Appellants. For the purpose of immediately answering the arguments advanced by the Appellants under this heading, it is sufficient to point out that long before *Erie Railroad Co. v. Tompkins* it was the settled rule that the Supreme Court of the United States would follow the decisions of state courts interpreting their own statutes.

Forsyth v. City of Hammond, 166 U.S. 506, 518; 41 L. ed. 1095, 1100, 17 S. Ct. 665, 670:

“The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the Supreme Court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions. In *Claiborne County v. Brooks*, 111 U. S. 400, 410, 28 L. ed. 470, 474, 4 Sup. Ct. 489, it was said: ‘It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state.’ ”

Memphis & C. R. Co. v. Pace (1931), 282 U.S. 241, 75 L. ed. 315, 319, 51 S. Ct. 108, 109:

“ * * * *These were all questions of state law, and their decision by that court is controlling here.*” [Emphasis ours].

Farncomb v. City and County of Denver (1919) 252 U.S. 7, 10, 64 L. ed. 424, 426, 40 S. Ct. 271, 272;

Castillo v. McConnico (1898) 168 U.S. 674, 680, 42 L. ed. 622, 625, 18 S. Ct. 229, 232;

Sanford v. Poe (1897) 165 U.S. 194, 41 L. ed. 683, 17 S. Ct. 305;

City of Sioux Falls v. Farmers etc. Trust Co., (C.C.A. 8th, 1905), 136 Fed. 721, 732.

A proceeding in mandamus is a proceeding in a state court under U. S. Revised Statutes, section 905 (28 U.S.C.A. §687).

Board of Liquidation v. State of Louisiana, 179 U.S. 622, 45 L. ed. 347, 21 S. Ct. 263.

(b) *Proceedings in the state courts did not deprive Appellants of their property without due process of law.* The argument that this Court may not give effect to the First Maricopa Case, the Second Maricopa Case, and the Taxpayer's Suit without depriving Appellants of their property without due process of law is entirely without support either on principle or authority. We shall point out under Point III that these decisions are all *res judicata*. The essential fact—overlooked by Appellants—is that these are representative suits. The doctrine of representation is applied in cases involving ques-

tions under state laws and constitutions and is likewise applied in cases under the Federal Constitution.

Mitchell v. First National Bank of Chicago (1901) 180 U.S. 471, 45 L. ed. 627, 21 S. Ct. 418;

Fidelity National Bank and Trust Co. v. Swope (1927) 274 U. S. 123, 71 L. ed. 959, 47 S. Ct. 511;

Grubb v. Public Utilities Commission of Ohio, (1930) 281 U.S. 470, 475, 74 L. Ed. 972, 50 S. Ct. 374, 377;

34 C. J. 1158, 1159;

3 *Freeman on Judgments* (5th Ed. 1925), 3010, 3011;

Kentucky v. Indiana, 281 U.S. 163, 74 L. ed. 784, 50 S. Ct. 275, specifically upheld the right of a state or its officers to act in a representative capacity on behalf of all parties interested in the litigation.

Even on the basis of Appellants' contentions that the State Courts reached an erroneous conclusion (which is not the fact) no infraction of the 14th Amendment can be asserted.

Central Land Co. v. Laidley, 159 U.S. 103, 112, 40 L. ed. 91, 16 S. Ct. 80;

Patterson v. Colorado, 205 U.S. 454, 460, 51 L. ed. 879, 27 S. Ct. 556;

Bacon v. Texas, 163 U.S. 207, 41 L. ed. 133, 16 S. Ct. 1023.

(c) *The judgments in the State Courts are rules of decision in the Federal Courts.* The argument that the decisions of the Supreme Court of Arizona in the First and Second Maricopa Cases are not en-

titled to great weight comes with ill-grace from the learned counsel who participated as amicus curiae in the First Maricopa Case and whose brief filed in the Supreme Court of Arizona is included in the Record herein (Brief of Gust, Rosenfeld, Divelbess, Robinette & Coolidge, by J. L. Gust, R 95-113). The record shows that in the First Maricopa Case the decision was rendered on May 4, 1942. Rehearing was asked for, in which briefs were filed not only by the local attorneys in the State of Arizona but by eminent counsel in other parts of the country. From May 4, 1942, until September 16, 1942, the Supreme Court of Arizona carefully reconsidered its former decision and denied a rehearing. Every question of law that was or could have been presented was before the Supreme Court of Arizona and that Court, being fully advised, rendered a correct and accurate decision. The statement that the decision was based upon a superficial examination of the Revised Statutes of 1913 is not correct. In the Second Maricopa Case, decided April 12, 1943, the same question was again raised by the Attorney General of the State of Arizona. Again the Supreme Court of Arizona reached the same conclusion. The Superior Court of Maricopa County reached the same conclusion in the Taxpayer's Suit. The District Court of the United States, for the District of Arizona, has reached the same conclusion by independent examination.

(d) *The decisions of the State Courts are correct.* The Supreme Court of Arizona correctly held that the bonds of Maricopa County were subject to call and redemption by publication of notice of redemption immediately upon the issuance of the

bonds by the Loan Commissioners of the State of Arizona. It would seem a sufficient answer to the contention of Appellants to refer again to the fact that the First Maricopa Case was decided on May 4, 1942, and that the Supreme Court affirmed its judgment by denying a rehearing on September 16, 1942, after the same points urged by Appellants had been reiterated in the able briefs then filed before the Supreme Court of Arizona. Again, on April 12, 1943, the Supreme Court of Arizona in the Second Maricopa Case reached identically the same conclusion, supported by the authorities therein cited—a conclusion confirmed by the judgment of the Superior Court in the Taxpayer's Suit and by the independent examination of the entire subject by the United States District Court for Arizona.

(c) *The Revised Statutes of 1913 are statutes of the State of Arizona.* The assertion that the statute to be construed is in truth an Act of Congress is in keeping with the other assertions of like character made throughout the Brief of Appellants. The statute before this Court is the Revised Statutes of Arizona, 1913, enacted after Arizona had been admitted to the Union as a sovereign state and the statute is therefore a state statute irrespective of any model which might have been followed in its draftsmanship. The State Court decisions are final even though they differ from Federal Court interpretation of the Federal statute from which the state statute was adopted.

Louisville Ry. Co. v. Kentucky, 183 U.S.
503, 46 L. ed. 298, 22 S. Ct. 95.

III

THE DECISIONS OF THE SUPREME COURT OF ARIZONA IN THE FIRST AND SECOND MARICOPA CASES AND OF THE SUPERIOR COURT IN THE TAXPAYER'S SUIT ARE *RES JUDICATA*, FINAL, BINDING AND CONCLUSIVE UPON THE RIGHTS OF APPELLANTS AND ALL OTHERS.

1. *A general review of the purpose of and the issues involved in the First Maricopa Case and Second Maricopa Case and in the Taxpayer's Suit.*

(a) *First Maricopa Case.* The First Maricopa Case was a proceeding in mandamus brought by the Board of Supervisors of Maricopa County against the public officials constituting the Loan Commissioners of the State of Arizona to refund the outstanding bonded indebtedness of Maricopa County. All of the facts are disclosed in the Petition for Writ of Mandate and in the decision of the Supreme Court of Arizona. There is not, and never has been, any controversy as to whether (i) the facts were fully disclosed, (ii) whether the facts were accurately disclosed, or (iii) the legal issues involved. On May 4, 1942 the Supreme Court of Arizona rendered its decision holding that the county bonds were subject to redemption upon the issuance of bonds by the Loan Commissioners of the State of Arizona and the publication of the notice of redemption was provided by Chapter 1, Title 52 of the Revised Statutes of Arizona 1913. The decision should have caused no surprise in view of the earlier decision of the Supreme Court on May 16, 1914 in *Board of Supervisors v. Hawkins*, 16 Ariz. 16, 140

Pac. 821, at page 823. One of the briefs filed in the action—that of Mr. J. L. Gust, attorney for Appellants herein—is included in the Record (R 95-113). An able brief filed by Messrs. Cox & Cox, attorneys of Phoenix, Arizona, reviewed the entire legislative history of the prior Territorial and Congressional Acts and of the decisions of the territorial courts and the Supreme Court of the United States, a copy of which, with the permission of this Court, will be filed herein at the time of argument. After considering all of the briefs filed, the Supreme Court of Arizona denied rehearing on September 16, 1942 and thereby affirmed its former decision and directed that a preemptory writ of mandate issue. It is incontrovertible that if the arguments advanced by Appellants in this proceeding are valid, it would necessarily have followed that the writ would have been denied by the Supreme Court of Arizona. It is apparent, therefore, that the Supreme Court of Arizona intended to, and did decide that all of the objections raised in this proceeding are without merit. Following the decision in the First Maricopa Case, the Loan Commissioners of the State of Arizona authorized the issuance of refunding bonds and advertised them for sale. On February 10, 1943, the Loan Commissioners awarded the bonds to the only bona fide bidder who filed with the Commissioners a certified check on the First National Bank of Arizona in the sum of \$205,000 (R 114-127). The certified check of the successful bidder is still on file in the office of the State Treasurer of the State of Arizona, but the refunding bonds have not yet been delivered to them and their good faith funds in the sum of \$205,000 have been

tied up since February 10, 1943, by reason of this litigation.

(b) *Second Maricopa Case.* The Second Maricopa Case was instituted because of a ruling of the Attorney General of the State of Arizona to the Loan Commissioners advising them, notwithstanding their award of the bonds, not to execute or deliver the bonds:

“After awarding the bonds to the successful bidder the Loan Commissioners, acting on the advice of the Attorney General of the State, refused to execute and deliver the 2¾% refunding bonds for several reasons.” (136 P. 2d 270, 271.)

The Board of Supervisors of Maricopa County were thereupon compelled a second time to institute a mandamus proceeding to compel the execution and delivery of the refunding bonds and the Petition for Writ of Mandate is in the Record. It may be referred to for a complete explanation of the circumstances surrounding this second suit (R 167-218). It conclusively appears that this was a representative suit from the Petition itself which alleges:

“4. That plaintiff, Maricopa County, is the real party in interest in this proceeding and that defendants, and each of them, are sued herein as public officers, to-wit, as and constituting the Loan Commissioners of the State of Arizona. That the proceedings herein nevertheless affect all taxpayers in Maricopa County and the owners of all property subject to taxation within Maricopa County, as well as the owners and holders of the outstanding Highway Bonds of Maricopa County whose bonds are subject to redemption upon publication of notice of redemp-

tion in accordance with the proceedings set forth herein.” (R 216)*

All of the points involved in this appeal were again elaborately briefed and argued before the Supreme Court of Arizona in the Second Maricopa Case. The very first point involved was a review of the decision in the First Maricopa Case on the question of whether or not the Maricopa County Bonds were in fact redeemable by the issuance of bonds by the Loan Commissioners of the State of Arizona and the publication of the notice of redemption.

In effect the Supreme Court of Arizona has four times decided this question.

First, in 1914 prior to the issuance of the Maricopa County Bonds, on May 4, 1942, in Board of Supervisors v. Hawkins, 16 Ariz. 16, 140 Pac. 82;

Second, in the original decision in the First Maricopa Case on May 4, 1942;

Third, in the decision denying a rehearing of the First Maricopa Case on September 16, 1942; and

Fourth, in the decision in the Second Maricopa Case on April 12, 1943.

The fact that the First and Second Maricopa Cases were mandamus proceedings is immaterial.

*Rule 2 of the Rules of Procedure of the Supreme Court of Arizona contains the following requirement in the case of original applications:

“In case any court, judge or other officer, or any board or other tribunal in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interests would be directly affected by the proceedings.”
2 Arizona Code Annotated, 1939, page 310.

Adams Exp. Co. v. Ohio State Auditor,
 165 U.S. 194, 41 L. ed. 683, 17 S. Ct. 305
 (rehearing denied 166 U.S. 185, 41 L. ed.
 965, 17 S. Ct. 604).

Notwithstanding the fact that Mr. Gust appeared in the guise of *amicus curiae* on behalf of his client, he now seeks to relitigate in this court all of the issues which have been tried and determined by the Supreme Court of Arizona.

(c) *The Taxpayer's Suit.**

On April 24, 1943, Mr. J. L. Gust, attorney for the Appellants herein, filed suit in the Superior Court of Maricopa County, purporting to act as taxpayer, to restrain the issuance and delivery of the refunding bonds by the Loan Commissioners of the State of Arizona. His firm, Messrs. Gust, Rosenfeld, Divilbess, Robinette & Coolidge, acted as his attorneys (Brief for Appellees, Appendix No. 1, page 41). Every issue raised in this appeal was raised by Mr. Gust in the Superior Court of Maricopa County and upon the entry of a decree settling the matter on summary judgment (Brief of Appelles, Appendix No. 1, page 72) Mr. Gust failed to take an appeal and the decision of the Superior Court of Maricopa County is now final, conclusive and binding—the time for appeal having long since elapsed (Section 21-1801 Arizona Code Annotated, 1939). Why no appeal to the Supreme Court of Arizona was taken, and why certiorari to the Supreme Court of the United States was not applied for, are matters not disclosed in the able brief of Appellants, but the fact that no appeal was taken is sufficient answer

*The transcript in the Taxpayer's Suit is set forth in full as Appendix No. I to this brief and printed separately.

to the suggestion made on page 125 of the Brief for Appellants that the facts disclose

“what would be considered sharp practice if the case were between individuals”.

These facts make out a clear case upon which the plea of *res judicata* is properly predicated. Defendants expressly pleaded *res judicata* and set the plea up affirmatively in their third defense (R 78) and we now pass to a consideration of this question. When this plea is sustained the state court decisions are binding even though a Federal question be claimed.

Stone v. Bank of Ky., 174 U.S. 408; 19 S. Ct. 881; 43 L. ed. 1187, affirming 88 Fed. 383.

(d) *The Arizona Judgments are res judicata.* The judgments in the First and Second Maricopa Cases and in the Taxpayer's Suit are *res judicata* upon all the issues involved in this case and conclusively determine all such issues in favor of Appellees. The answer of the Appellees (defendants in the court below) affirmatively set forth the plea of *res judicata*.

The rule laid down by the Arizona Supreme Court in conformity with the general rule elsewhere prevailing is that a judgment involving matters of general public interest rendered either in an action or proceeding against the state, county, municipality or other public corporation, or a public officer thereof, or in an action or proceeding between taxpayers of the state, county, municipality, or other public corporation, on the one hand, and such state, county, municipality or other public corporation, or the officers thereof on the other, is *res judicata* upon

all taxpayers, bondholders and all other persons though not named as parties therein. Such judgments must therefore in this Court be given similar effect as *res judicata* under U. S. Revised Stat. section 905 (28 U.S.C.A. §687) which declares that judicial proceedings in a state court

“shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.”

The leading case in Arizona is *Luhrs v. City of Phoenix*, 33 Ariz. 156, 262 Pac. 1002. That case involved an issue of bonds of the City of Phoenix, the validity of which had been sustained by a prior decision of the Supreme Court of Arizona in the case of *Buntman v. City of Phoenix*, 32 Ariz. 18, 255 Pac. 490. When the same questions were again litigated in *Luhrs v. City of Phoenix*, the Supreme Court said:

“Nothing is clearer than that if assignments had been based upon them the court would have determined their effect at that time; hence they are presumed to have been adjudicated and cannot now be made the basis of another action.” (262 Pac. 1003).

The Arizona rule is a rule of universality which is followed in substantially all other states.

Price v. Sixth District Agricultural Assn.,
201 Cal. 502, 258 Pac. 387;

Golden Gate Bridge and Highway Dist. v. Felt, 214 Cal. 308, 5 P. 2d 585;

Floersheim v. Board of Commrs. of Harding County (1922) 28 N.M. 330, 212 Pac. 451;

- Gamble v. City of San Diego*, (C.C.S.D. Cal. 1897), 79 Fed. 487;
- McIntosh v. City of Pittsburgh* (C.C.W.D. Pa 1901), 112 Fed. 705;
- Howard-Sevier Road Improvement District v. Hunt*, (1924) 166 Ark. 62, 265 S. W. 517, 519;
- Harmon v. Auditor of Public Accounts* (1887) 123 Ill. 122, 13 N.E. 161, 163, 5 Am. St. Rep. 502;
- Delta Fish and Fur Farms v. Pierce* (1931) 203 Wis. 519, 234 N.W. 881, 885;
- Town of Tallassee v. State ex rel. Brunson* (1921), 206 Ala. 169, 89 So. 514, 20 A.L. R. 1127;
- Tri-County Improvement District v. Vincennes Bridge Co* (1925), 170 Ark. 22, 278 S.W. 627;
- Stevens v. Shull* (1929), 179 Ark. 766, 19 S.W. 2d 1018, 64 A.L.R. 1258;
- Rigsby v. Ruraldale Consolidated School District* (1929), 180 Ark. 122, 20 S.W. 2d 624;
- Farncomb v. City and County of Denver* (1918), 64 Colo. 13, 171 Pac. 66;
- Terry v. Town of Waterbury* (1869), 35 Conn. 526;
- Holman v. Bridges* (1927), 165 Ga. 296, 140 S.E. 886;
- Healey v. Deering* (1907), 231 Ill. 423, 83 N.E. 226, 121 Am. St. Rep. 331;
- People ex rel Chilcoat v. Harrison* (1912), 253 Ill. 625, 97 N.E. 1092; Ann. Cas. 1913A 539;

- Greenberg v. City of Chicago* (1912), 256 Ill. 213, 99 N.E. 1039, 49 L.R.A. (N.S.) 108;
- Pear v. City of East St. Louis* (1916), 273 Ill. 501, 113 N.E. 60;
- People ex rel Gibbons v. Clark* (1920), 296 Ill. 46, 129 N.E. 583;
- Sabin v. Sherman* (1882), 28 Kan. 289;
- Home Construction Co. v. Duncan* (1902), 24 Ky. L. Rep. 94. 68 S.W. 15;
- Locke v. Commonwealth* (1902), 113 Ky. 864, 69 S.W. 763;
- Holt v. Moxley* (Md. 1929), 147 Atl. 596;
- Van Baalen v. City of Detroit* (1921), 217 Mich. 125, 185 N.W. 883;
- Williams v. Board of Supervisors of De Soto County* (1925), 139 Miss. 78, 103 So. 812;
- Peters v. City of St. Louis* (1910), 226 Mo. 62, 125 S.W. 1134, 21 Ann. Cas. 1069;
- People's Gas & Electric Co. v. City of Oswego* (1923), 207 App. Div. 134, 202 N. Y. S. 243; affd. (1924), 238 N.Y. 606, 144 N.E. 910;
- McHenry County v. Brady* (1917), 37 N. D. 59, 163 N.W. 540;
- Eaton v. Board of Trustees of Mocksville Graded School Dist.* (1922), 184 N.C. 471, 114 S. E. 689;
- Ohio Fuel Gas Co. v. City of Mt. Vernon* (1930), 37 Ohio App. 159, 174 N.E. 260;
- Worrell v. Landis* (1914), 42 Okl. 464, 141 Pac. 962;

- State ex rel Brown v. Chester & Lenoir
Narrow Gauge R. Co.* (1880), 13 S.C. 291;
- Davis v. Town of West Greenville* (1928),
147 S.C. 448, 145 S.E. 193;
- Girardin v. Dean* (1878), 49 Tex. 243;
- Hovey v. Shepherd* (1912), 105 Tex. 237,
147 S. W. 224;
- McCleskey v. State ex rel Cottrell* (1893),
4 Tex. Civ. App. 322, 23 S.W. 518;
- City of Dallas v. Armour & Co.* (Tex. C.
A. 1919), 216 S.W. 222;
- Cochran County v. Boyd* (Tex. Civ. App.
1930), 26 S.W. (2d) 364;
- Stallcup v. City of Tacoma* (1895), 13
Wash. 141, 42 Pac. 541, 52 Am. St. Rep.
25;
- State ex rel Forgues v. Superior Court*
(1912), 70 Wash. 670, 127 Pac. 313;
- Gallagher v. City of Moundsville* (1891), 34
W. Va. 730, 12 S.E. 859.

It is obvious that the suit instituted by Mr. Gust as a taxpayer in the Superior Court of Maricopa County was a true taxpayer's suit and was brought in a representative capacity on behalf of all other taxpayers, whether they had legal notice of the proceedings or had any connection with the officers or public corporation in fact sued as defendants, or whether or not they expressly authorized the representation. The rule is established without question that a judgment against such a representative is a bar to subsequent litigation of the same question.

Similarly, in the First Maricopa Case, Mr. Gust appeared on behalf of the bondholders, as shown by

his own admission (R 112). He took an active part in the proceedings. His sole claim in this Court that his clients are not bound by the adjudication is that his appearance was in the capacity of *amicus curiae*. It is submitted, however, that the circumstance that Mr. Gust's appearance was of this character does not affect the question. Mr. Gust could not immunize his clients from the usual effect which follows the contest of a point in a court of law; that is, the contestants are bound by the decision thereon, whatever it may be, merely through the adoption of the character of *amicus curiae* and the addition of those words after their names on briefs. To permit such a practice would be subversive of the principles upon which *amici curiae* are permitted to be heard and would tend to convert a useful and beneficial institution into a device for nullifying the doctrine of *res judicata* and the salutary principles on which that doctrine is based.

As was said in the well-considered case of *Lyman v. Faris* (1880), 53 Iowa 498, 5 N.W. 621:

“It will not do to allow parties in interest to fight their legal battles over the shoulders of a public officer and then claim that the judgments are not binding upon them because they were not parties nor privies.”

McMillan v. Barber Asphalt Paving Co.
(1912), 151 Wis. 48, 138 N.W. 94, Ann.
Cas. 1914B 53;

McMillan v. City of Fond du Lac (1909),
139 Wis. 367, 120 N.W. 240.

The fact that a party causes his attorney to appear in the guise of *amicus curiae* does not change the binding effect of *res judicata*.

Greenwich Ins. Co. v N. & M. Friedman Co. (C.C.A. 6th, 1905), 142 Fed. 944, cert. den. (1906), 200 U.S. 621, 50 L. ed. 624, 26 S. Ct. 758;

Columbia Ins. Co. of New Jersey v. Mart Waterman Co. (C.C.A. 2nd 1926), 11 F. (2d) 216, cert. den. (1926), 271 U.S. 672, 70 L. ed. 1144, 46 S. Ct. 486;

Mitchell v. Cunningham (C.C.A. 9th, 1925), 8 F. (2d) 813, affd. (C.C.A. 9th 1927), 21 F. (2d) 881, cert. den. (1928), 276 U.S. 614, 72 L. ed. 732, 48 S. Ct. 208;

Theller v. Hershey (C.C.N.D. Cal. 1898), 89 Fed. 575;

Penfield v. C. & A. Potts & Co. (C.C.A. 6th 1903), 126 Fed. 475;

Walz v. Agricultural Insurance Co. of Watertown (E.D. Mich. 1922), 282 Fed. 646;

Hall v. Main (E.D. Ill. 1929), 34 F. (2d) 528;

Ruocco v. Logiocco (1926), 104 Conn. 585, 134 Atl. 73;

Metropolitan Casualty Ins. Co. v. Albritton (1926), 214 Ky. 16, 282 S.W. 187;

-- *Maryland Casualty Co. v. Huffaker's Admr.* (1929), 227 Ky. 358, 13 S.W. (2d) 260;

State National Bank of Lynn v. Beacon Trust Co. (1929), 267 Mass. 355, 166 N. E. 837;

Independent Elevators v. Davis (1928), 116 Neb. 397, 217 N.W. 577;

Edmiston v. Empire Ice and Shingle Co. (1928), 147 Wash. 490, 266 Pac. 703;

State v. McDonald (1912), 63 Ore. 467,
128 Pac 835;

Peterson v. Lewis (1916), 78 Ore. 641, 154
Pac. 101;

Olcott v. Reese (1927), 291 S.W. (Tex.
Civ. App.), 261;

Walker County Lumber Co. v. Edmonds
(1927), 298 S.W. (Tex. Civ. App.), 610;

*Fort Worth & Denver City Ry. Co. v. Great-
house* (1931), 41 S.W. (2d) (Tex. Civ.
App.), 418.

Bearing in mind that this was a representative proceeding, it necessarily follows that Mr. Gust had a right to appeal to the Supreme Court of the United States in the First Maricopa Case had he chosen to exercise it.

Board of Liquidation of the City Debt. v. Louisiana ex rel. Wilder (1901), 179 U. S. 622, 45 L. ed. 347, 21 S. Ct. 263;

Parsons v. Arnold (1930), 235 Ky. 600,
31 S.W. 2d 928, 931;

Ashton v. City of Rochester (1892), 133 N. Y. 187, 30 N.E. 965, 28 Am. St. Rep. 619;

Wolf River Drainage Dist. v. Nigus (1931),
133 Kan. 742, 3 P. 2d 648.

Furthermore, as we have pointed out, the mandamus proceedings in the Supreme Court of Arizona were representative suits. All parties, whether bondholders, taxpayers, or otherwise interested, were in truth and in fact represented by the public officers of the State of Arizona. The very purpose of a class suit is to bring up for adjudication the interests of all parties who by reason of their number

and diversity cannot be served with legal process. This is particularly true in cases involving questions of public interest and importance. A judgment in a suit against such representative is held to be a bar to subsequent litigation of the same question by every court which has considered the problem.

Board of Supervisors of Riverside County v. Thompson (C.C.A., 9th, 1903), 122 Fed 860;

Holt County v. National Life Insurance Co. (C.C.A., 8th, 1897), 80 Fed. 686;

City Council of Montgomery v. Walker (1908), 154 Ala. 242, 45 So. 586, 129 Am. St. Rep. 54;

Howard-Sevier Road Improvement District No. 1 v. Hunt (1924), 166 Ark., 62, 265 S. W. 517;

Sauls v. Freeman (1888), 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190;

Sampson v. Commissioner of Highways (1904), 115 Ill. App. 443;

State ex rel. Piel v. Arkansas Construction Co. (1929), 201 Ind. 259, 167 N.E. 526;

Clark v. Wolf (1870), 29 Iowa 197;

Clark v. Lee (1870) 29 Iowa 209;

Tredway v. Sioux City & Pac. R. Co. (1874), 39 Iowa 663, 665;

Lyman v. Faris (1880), 53 Iowa 498, 5 N. W. 621;

Cannon v. Nelson (1891), 83 Iowa 242, 48 N.W. 1033;

McEntire v. Williamson (1901), 63 Kan. 275, 65 Pac. 244;

Stone v. Winn (1915), 165 Ky. 9, 176 S.W. 933, 940;

Parker v. Scogin (1856), 11 La. Ann. 629;

Taxpayers v. O'Kelley (1897), 49 La. Ann. 1039, 22 So. 311;

Kaufer v. Ford (1907), 100 Minn. 49, 110 N.W. 364;

Bank of Commerce and Trust Co. v. Commissioners of Tallahatchie Drainage District (1930), 157 Miss. 336, 128 So. 91;

State ex rel. Wilson v. Rainey (1881), 74 Mo. 229;

Consolidated School District No 4 of Grene County v. Day (Mo. 1931), 43 S.W. (2d) 428, 430;

Shanahan v. City of South Omaha (1902), 2 Neb. (Unof.) 466, 89 N.W. 285;

Ashton v. City of Rochester (1892), 133 N.Y. 187, 30 N.E. 965, 31 N.E. 334, 28 Am. St. Rep. 619;

Bear v. Board of Commissioners of Brunswick County (1898), 122 N.C. 439, 29 S.E. 719, 65 Am. St. Rep. 711;

State ex rel. Davis v. Willis (1910), 19 N.D. 209, 124 N.W. 706;

Grand Island & N. W. R. Co. v. Baker (1896), 6 Wyo. 369, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L.R.A. 835.

2. *Whether the judgment of a state court is res judicata is purely a question of state law and the federal courts are bound thereby.*

The First and Second Maricopa Cases and the Taxpayer's Suit operate as *res judicata* under the

laws of the State of Arizona and the Federal Courts are bound thereby. By Section 905 of the Revised Statutes of the United States (28 U.S.C.A. section 687) the judgments of the Arizona Courts must, by all of the courts of the United States, be given:

“such faith and credit * * * as they have by law or usage in the courts of the state from which they were taken.”

The earliest case construing the above statute is *Mills v. Duryee* (1813) 11 U.S. (7 Cranch) 481, 3 L. ed. 411, where Mr. Justice Storey said, in construing the above statute:

“It remains only then to inquire in every case, what is the effect of a judgment in the state where it is rendered.”

Subsequent decisions of the Supreme Court of the United States have firmly established the principle that the effect that will be given in the Federal Courts to the judgment of a state court as *res judicata* depends upon the law of the state in which the judgment is rendered.

In *Chicago & Alton Ry. Co. v. Wiggins Ferry Co.* (1883) 108 U.S. 18, 27 L. ed. 636, 1 S. Ct. 614, the court said:

“Whether as a judgment it operates as an estoppel does not depend on the Constitution or laws of the United States. The correct decision of this question of estoppel, therefore, does not depend on the construction of the Constitution or laws of the United States, but on the effect of a judgment under the laws of Missouri. The public Acts of Illinois are in no way involved. If full faith and credit were not given to them by the Missouri court in the judgment which

has been rendered, that may entitle the Railroad Company to a review of the judgment here on a writ of error, but in no other way can this or any other court of the United States invalidate that judgment on account of such mistakes, if any were in fact made." (27 L. ed. at p. 637).

See, also:

Hampton v. McConnel (1818), 16 U.S. (3 Wheat.) 234, 4 L. ed. 378;

Embry v. Palmer (1882), 107 U.S. 3, 9, 27 L. ed. 346, 348, 2 S. Ct. 25;

Union and Planters Bank of Memphis v. City of Memphis (1903), 189 U.S. 71, 47 L. ed. 712, 23 S. Ct. 604;

City of Covington v. First National Bank of Covington, (1905), 198 U.S. 100, 49 L. ed. 963, 25 S. Ct. 562;

Kenney v. Craven (1909), 215 U.S. 125, 54 L. ed. 122, 124, 30 S. Ct. 64;

Wright v. Georgia Railroad and Banking Co. (1910), 216 U.S. 420, 54 L. ed. 544, 30 S. Ct. 242;

Fidelity National Bank and Trust Co. v. Swope (1927), 274 U.S. 123, 71 L. ed. 959, 47 S. Ct. 511;

Board of Liquidation of the City Debt v. Louisiana ex rel. Wilder, 179 U.S. 622, 45 L. ed. 347, 21 S. Ct. 263.

These cases established a general rule that Federal Courts are bound to accord to a judgment of a state court precisely the same effect it has in the courts of the state in which it is rendered. Applying this general rule, it is held by a long line of cases involving private corporations, that when the sub-

ject matter of the action is common to all of the members of such corporation (shareholders or certificate holders) who are too numerous to be brought before the court in their entirety, and where therefore it is essential that the rights of all be decided by one law only, it is proper for the courts of the state of incorporation to prescribe a rule of representation. The matter is regarded as one primarily concerning the state of incorporation and the determination of its courts as to who are represented and how they will be represented is final and must be given full faith and credit by all the courts of the United States

Hawkins v. Glenn (1889), 131 U.S. 319, 33 L. ed. 184, 9 S. Ct. 739;

Hancock National Bank v. Farnum (1900), 176 U.S. 640, 44 L. ed. 619, 20 S. Ct. 506;

Bernheimer v. Converse (1907), 206 U.S. 516, 51 L. ed. 1163, 27 S. Ct. 755;

Converse v. Hamilton (1912), 224 U.S. 243, 56 L. ed. 749, 32 S. Ct. 415, Ann. Cas. 1913D 1292;

Supreme Council of the Royal Arcanum v. Green (1915), 237 U.S. 531, 59 L. ed. 1089, 35 S. Ct. 724;

Supreme Tribe of Ben Hur v. Cauble (1921), 255 U.S. 356, 65 L. ed. 673, 41 S. Ct. 338;

Modern Woodman of America v. Mixer (1925), 267 U.S. 544, 69 L. ed. 783, 45 S. Ct. 389, 41 A.L.R. 1384.

The above decisions involving private corporations set forth a principle that is equally, if not more, applicable to public or municipal corpora-

tions. A public or municipal corporation is more completely localized than a private corporation. It cannot migrate to other states, as can private corporations. It is a local affair and by analogy to private corporations the representations of such members of the corporation by its officers, or by other members, would immediately be regarded as proper rules of representation.

Board of Liquidation of the State Debt v. Louisiana ex rel. Wilder (1901), 179 U. S. 622, 45 L. ed. 347, 21 S. Ct. 263,

where representation of bondholders by the officers of a city was held to involve no federal question. In this case a writ of mandate had been brought against the Board of Liquidation to compel the Board to sign certain refunding bonds. The Board had refused to sign the bonds on the ground that the proposed indebtedness would impair the obligation of contracts with previous bondholders and creditors of the city in that the holders of the new bonds would be entitled to share pro rata in the proceeds of a 1% ad valorem tax which was the limit prescribed by the state constitution for the taxation of property in the city.

“The motion to dismiss is without colorable support. The contention that, as public bodies charged with the performance of ministerial duties, both the board of liquidation and the drainage commission had not the capacity to plead that the provisions of the state Constitution impaired the obligations of contracts in violation of the Constitution of the United States, is foreclosed by the decision of the court below. In that court, as we have said in the statement of the case, the want of capacity in both the bodies to urge the defenses in question

was expressly put at issue and was directly passed on, the court holding that under the statutes of the state of Louisiana both the bodies occupied such a fiduciary relation as to empower them to assert that the enforcement of the provisions of the state Constitution would impair the obligations of the contracts entered into on the faith of the collection and application of the 1 per cent tax and of the surplus arising therefrom. Without implying that the reasoning by which this conclusion was deduced would command our approval were we considering the matter as one of original impression, and without pausing to note the ulterior consequences which may possibly arise from the ruling of the court below on the subject, we adopt and follow it as the construction put by the supreme court of the state of Louisiana on the statutes of that state in a matter of local and non-Federal concern.” (45 L. ed. at p. 352).

This case would appear to be a conclusive answer to the contentions of Appellants. We have pointed out that the rule of *res judicata* has been established in Arizona in *Luhrs v. City of Phoenix*, 33 Ariz. 156, 262 Pac. 1002, holding a prior adjudication as to the validity of bonds binding upon all parties whether actually present in the suit or represented therein by public officer. Where a public officer represents the interests of *bondholders* in matters common to all, the United States Supreme Court has held that the Federal Courts are bound to follow the rule laid down by the state courts. Accordingly both the First and Second Maricopa Cases are *res judicata*, conclusive and binding upon the Appellants herein who were represented in the proceedings in all respects by the public officers of the State of Arizona with like force and effect as though they

had personally appeared therein. In addition we further contend that the Appellants herein actually did appear in the First Maricopa Case by and through their attorney, Mr. J. L. Gust, even though he appeared in that suit in the guise of *amicus curiae*.

C O N C L U S I O N

We submit that the record on its face discloses this to be a case of vexatious litigation, wholly without merit; that no federal question is involved; that the decisions of the State Courts are correct and *res judicata* and that the causes therein heard and determined should not be retried in this court. The judgment of the court below should be affirmed.

Dated: Phoenix, Arizona,
November 15, 1943.

Respectfully submitted,

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EXHIBIT A

DISCLOSING PARALLEL BOND RE-
FUNDING SECTIONS OF REVISED
STATUTES OF ARIZONA, 1913, AND
ARIZONA CODE ANNOTATED, 1939.

REVISED STATUTES OF ARIZONA, 1913

5251. For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the State of Arizona, or of the Territory of Arizona assumed by the State of Arizona, and such future indebtedness as may be or is now authorized by law, the governor of the said state, together with the state auditor and state treasurer, and their successors in office shall constitute a board of commissioners, to be styled the Loan Commissioners of the State of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

5252. It shall be and is hereby declared the duty of the said loan commissioners to provide for the payment of the existing state indebtedness due, and to become due, or that is now, or may hereafter be authorized by law; and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest of the existing and subsisting state legal indebtedness, and also that which may at any time become due, or is now or may be hereafter authorized by law, the said commissioners shall, from time to time, issue negotiable coupon bonds of this state when the same can be issued at a lower rate of interest than previously paid on state indebtedness and to the profit and benefit of the state.

5264. No bond issued under the provisions of this chapter shall be taxed within this state.

ARIZONA CODE ANNOTATED, 1939

10-401. *Loan commissioners—Issuance of state bonds—Tax exempt.*—The governor, the state auditor and state treasurer, shall constitute the loan commissioners of the state of Arizona. They shall provide for the payment of the state indebtedness due, and to become due, now existing, or hereafter authorized; and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest of the same, from time to time, issue negotiable coupon bonds of the state when they can be issued at a lower rate of interest than previously paid or when to the profit and benefit of the state. Bonds issued under the provisions of this article shall not be taxed within this state. (Laws 1912 (S.S.), ch. 29, §§1, 2, 14; p. 98; R. S. 1913, §§5251, 5252, 5264; cons. & rev., R. C. 1928, §2646.)

REVISED STATUTES OF ARIZONA, 1913

5253. Said bonds shall be issued as nearly as practicable in denominations of one thousand dollars, but bonds of a lower denomination, of not less than one hundred dollars may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners but in no case to exceed five per centum per annum, which interest shall be paid in gold coin or its equivalent in lawful money of the United States, on the 15th day of January and July in each year, at the office of the state treasurer or some bank or trust company in the City of New York at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States within twenty-five years after date of their issue. The state reserves the right to redeem at par any of said bonds in their numerical order at any time after fifteen years after the date thereof. They shall bear the date of their issue; state when, where, and to whom payable; rate of interest, and when and where such interest is payable; shall be signed by said loan commissioners; shall have the seal of the state affixed thereto; shall be countersigned by the state treasurer and bear his official seal, and shall be registered by the state auditor in a book to be kept by him for that purpose, which record shall show amount sold for, or if exchanged, for what exchanged; and the faith and credit of the state is hereby pledged for the payment of said bonds and the interest accruing thereon as herein provided.

ARIZONA CODE ANNOTATED, 1939

10-402. *Issuance of bonds—Terms*—Said bonds shall be issued as nearly as practicable in denominations of one thousand dollars (\$1,000), nor less than one hundred dollars (\$100), when necessary; bear interest at a rate to be fixed by the commissioners not exceeding five (5) per centum per annum, payable on the fifteenth day of January and July in each year, at the office of the state treasurer or at some bank or trust company in the city of New York, state of New York, at the option of the purchaser of the bonds; the principal shall be payable within twenty-five (25) years after the date of their issue, reserving the right to redeem at par any bonds in their numerical order at any time after fifteen (15) years from the date thereof. They shall bear the date of their issue, state where, and to whom payable, rate of interest shall be signed by said loan commissioners, have the seal of the state affixed thereto, countersigned by the state treasurer and bear his official seal, and shall be registered by the state auditor in a book kept by him for that purpose, which shall show the amount sold for, or if exchanged, for what exchanged. The faith and credit of the state shall be pledged for the payment of said bonds and the interest accruing thereon as herein provided. (R. S. 1913, §5253; rev., R. C. 1928, §2647.)

REVISED STATUTES OF ARIZONA, 1913

5254. Coupons for the interest shall be attached to each bond, so that they may be removed without injury to, or mutilation of such bond.

They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the state treasurer.

The said coupons shall cover the interest expressed in said bond from the date of issue until paid; but in no case shall bonds bear interest, nor shall interest be paid thereon for any time before their delivery to the purchaser, as hereinafter provided.

ARIZONA CODE ANNOTATED, 1939

10-403. *Interest coupons.*—Coupons for the interest shall be attached to each bond, consecutively numbered, bearing the same number as the bond to which attached, be signed by the state treasurer, and shall cover the interest expressed in said bond from the date of issue until paid. Bonds shall not bear interest, nor shall interest be paid thereon, for any time before delivery to the purchaser. (Laws 1912 (S.S.), ch. 29, §4, p. 98; R. S. 1913, §5254; rev., R. C. 1928, §2648.)

REVISED STATUTES OF ARIZONA, 1913

5255. Whenever the said loan commissioners may be authorized by law to issue bonds, or shall have decided to refund or redeem all or any part of the existing indebtedness of this state they shall direct the state treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published once a week for the period of one month in three newspapers published in the state, no two of which shall be published in the same county, and they may further direct the state treasurer, if in their opinion such action is desirable, to advertise as hereinbefore mentioned by at least one insertion in a publication published in the City of New York, in the State of New York, and in one in the City of San Francisco, in the State of California; such notice shall specify the amount of bonds to be sold, the place, day, and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said publication; and at the place and time named in said notice the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof, to the bidder or bidders making the best offer therefor; provided, that said loan commissioners shall have the right to reject any and all bids; and provided, further, that they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

ARIZONA CODE ANNOTATED, 1939

10-404. *Sale of bonds.*—Whenever the loan commissioners may be authorized to issue bonds, or decide to refund or redeem all or any part of the existing indebtedness of the state, they shall direct the state treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published once a week for one (1) month in three (3) newspapers published in the state, no two of which shall be published in the same county, and, if desirable, in a publication in the city and state of New York, and in San Francisco, California. Such notice shall state the amount of bonds to be sold, the place, day, and hour of sale, and that bids will be received by the treasurer for the purchase of said bonds within one (1) month from the expiration of such publication. At the place and time named in said notice the loan commissioners shall open all bids received by the treasurer and shall award the purchase of said bonds, or any part thereof, to the best bidder therefor. The loan commissioners may reject any and all bids, and may refuse to make any award unless sufficient security be furnished by the bidder for complying with his bid. (Laws 1912 (S.S.), ch. 29, §5, p. 98; R. S. 1913, §5255; rev., R. C. 1928, §2649.)

REVISED STATUTES OF ARIZONA, 1913

5256. When the sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds, and any expense incurred by them therefor, for the publication of said notices, cost of remitting funds for the payment of interest or money on said bonds, and all necessary incidental expenses shall be paid out of the general fund of the state, upon the order of the state auditor, countersigned by the governor; and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

They shall, from time to time after signing said bonds, deliver them to the state treasurer, taking his receipt therefor, and charge him therewith.

5257. The state treasurer shall sell said bonds for cash, or exchange them for any of the indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any indebtedness be redeemed at more than its face value and any interest that may be due thereon.

The treasurer shall endorse by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

ARIZONA CODE ANNOTATED, 1939

10-405. *Delivery of Bonds.*— When the sale is awarded, the loan commissioners shall procure the necessary bonds, and, after signing said bonds, deliver them to the state treasurer, taking his receipt therefor, and charging him therewith. The treasurer shall deliver the bonds to the purchaser for cash, or exchange them for any of the indebtedness for the redemption of which they were issued. Bonds shall not be sold or exchanged for less than their face value and the accrued interest at the time of delivery, nor shall any indebtedness be redeemed at more than its face value and accrued interest. The treasurer shall indorse on the face of the paper evidencing the indebtedness received by him in exchange, the time when and the amount for which exchanged. (Laws 1912 (S.S.), ch. 29, §§6, 7, p. 98; R. S. 1913, §§5256, 5257; cons., & rev., R. C. 1928, §2650.)

REVISED STATUTES OF ARIZONA, 1913

5258. Moneys received by the treasurer shall be applied by him to the redemption of the indebtedness for the redemption of which bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of state warrants, of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

Before any such indebtedness shall be paid, the state auditor shall endorse on each certificate the amount due thereon, and shall write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record thereof.

ARIZONA CODE ANNOTATED, 1939

10-406. *Applying proceeds to redemption of indebtedness.*—The money received by the treasurer shall be applied by him to the redemption of the indebtedness for the redemption of which the bonds were issued, and the treasurer shall give notice, as for the payment and redemption of state warrants, of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease. Before such indebtedness be paid, the state auditor shall indorse on each certificate the amount due thereon, and write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record thereof. (Laws 1912 (S.S.), ch. 29, §8, p. 98; R. S. 1913, §5258; rev., R. C. 1928, §2651.)

REVISED STATUTES OF ARIZONA, 1913

5259. There shall be levied annually upon the taxable property in this state, and in addition to the levy for other authorized taxes, a sufficient sum to pay the interest on all bonds issued and disposed of hereunder, to be placed in the state treasury, in the fund to be known as the "Interest Fund." And each year after such bonds shall have been issued such additional amount shall be levied annually as will pay four per cent of the total amount issued until all the bonds issued hereunder are paid and discharged.

The state board of equalization, or, on their failure, the state auditor, shall determine the rate of tax to be levied in the different counties in the state to carry out the provisions of this section, and shall certify the same to the board of supervisors in each county and to the municipal or school authorities; and the said board of supervisors, or authorities, are hereby directed and required to enter such rate on their assessment rolls in the same manner and with the same effect as is provided by law in relation to other state, county, municipal, and school taxes. Every tax levied under the provisions or authority of this section shall be a lien against the property assessed.

All moneys derived from taxes authorized by this section shall be paid into the state treasury, and shall be applied:

First. To the payment of the interest on the bonds issued hereunder.

ARIZONA CODE ANNOTATED, 1939

10-407. *Tax levy for amortization—Application of fund—Duty of Officers—Penalty.*—There shall be levied annually upon the taxable property in this state, in addition to other levies, a sufficient sum to pay the interest on all bonds issued hereunder, to be placed in the state treasury in the interest fund. Each year after such bonds have been issued, such an additional amount shall be levied annually as will pay four (4) per cent of the total amount issued, until all the bonds are paid and discharged, and the same shall be placed in the state redemption fund as collected. The state board of equalization, or, on its failure, the state auditor, shall determine the rate of tax to be levied for such purpose, in the different counties in the state, and certify the same to the board of supervisors and taxing body in each county; and the said board of supervisors or taxing body shall enter such rate on their assessment rolls as other taxes. If any county or taxing body is or becomes delinquent in the payment of such taxes, the board of supervisors or taxing body shall, before the next levy, prorate such delinquencies and make such additional levy, in addition to the current annual rate certified to them by the board of equalization or the auditor, as may be necessary, to pay the interest and principal of such bonds on maturity. The state board of equalization may reconvene the board of Supervisors or any taxing body for the purpose of entering such rate or additional rate or levy or additional levy, as said board or auditor may certify. The county or municipal

REVISED STATUTES OF ARIZONA, 1913

(Sec. 5259 Cont'd.)

Second. To the payment of the principal of such bonds;

Provided, that all moneys remaining in the interest fund after the payment of the interest and all moneys remaining in the "redemption fund" after all of said bonds shall have been paid and discharged, shall be transferred by the state treasurer to the state "general fund".

ARIZONA CODE ANNOTATED, 1939

(Sec. 10-407 Cont'd.)

treasurer shall, on or before the first day of June of each year, pay to the state treasurer the total amount so certified to the board of supervisors, or taxing body, whether the whole amount has been collected from the levy of taxes therefor or not.

The money derived from such taxes shall be paid into the state treasury, and shall be applied; first, to the payment of the interest on the bonds issued hereunder; second, to the payment of the principal of such bonds, and whenever sufficient funds accrue to the credit of the state, the loan commissioner may direct the state treasurer to call such bonds for payment, if same be optional. Any interest earned by moneys in such redemption fund, shall be credited to the state, county, district, or municipality in proportion to the amount paid into the fund by the state, or such county, district or municipality. Any money remaining in the interest fund, after the payment of interest, and any money remaining in the redemption fund, after all of said bonds have been paid and discharged, shall be returned by the treasurer to the county, district or municipality whence it came.

If the board of supervisors, or any taxing body, refuse, or omit, to enter and levy such rate of tax, as certified to them by said board, or auditor; or refuse, or omit to do or cause to be done any act herein required, they shall be guilty of nonfeasance in office and individually liable on their bonds for the total amount so omitted, and the attorney general upon be-

REVISED STATUTES OF ARIZONA, 1913

ARIZONA CODE ANNOTATED, 1939

(Sec. 10-407 Cont'd.)

ing informed of such refusal, shall bring action therefor against such officials and their bonds. (Laws 1912 (S.S.), ch. 29, §9, p. 98; R. S. 1913, §5259; Laws 1927, ch. 111, §1, p. 422; rev., R. C. 1928, §2652.)

REVISED STATUTES OF ARIZONA, 1913

5260. Whenever, after the expiration of the fifteen years from the date of issuance of any bonds under this chapter, there remains after the payment of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the state treasurer to advertise, as in the manner of advertising by the loan commissioners for bids for sale of bonds, which advertisement shall state the amount of moneys in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which said fund is set apart to pay and discharge; and if such bonds so numbered in such advertisements shall not be presented for payment and cancellation at *at* the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the state auditor, who shall endorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The state auditor shall keep a record of all bonds issued and disposed of by the state treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom, payable, and if exchanged, for what, and when presented for redemption the date, amount due thereon, and person surrendering. The boards of supervisors of the counties, the mu-

ARIZONA CODE ANNOTATED, 1939

10-408. *Redemption of Bonds—Report.*—Whenever, after the expiration of fifteen (15) years from the date of issuance of any bonds, there is in the redemption fund a surplus of ten thousand dollars (\$10,000) or more, the state treasurer shall advertise, as bids for the sale of bonds are required to be advertised, stating the amount of money in the redemption fund, and that such amount has been set apart to pay and discharge the number of bonds, naming them by number in the order of their issuance. A copy of such advertisement shall be mailed to each bank or trust company at which the interest was made payable. If such bonds numbered in such advertisements are not presented for payment and cancelation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the state auditor, who shall indorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The state auditor shall keep a record of all bonds issued and disposed of by the state treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom payable, and if exchanged, for what, and when presented for redemption the date, amount due thereon, and person surrendering. (Laws 1912 (S.S.), ch.

REVISED STATUTES OF ARIZONA, 1913

(Sec. 5260 Cont'd.)

municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the state their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other state indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law, to said county, municipality, or school district upon official demand by said authorities. The county, municipality, or school district shall pay into the state treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the state board of equalization, or on their failure by the state auditor, to be levied for the payment of the principal of such bonds issued in redemption, or refunding, or of other bonds issued to such county, municipality, or school district, as herein provided, in the same manner as is herein provided for the payment of the principal and interest of state indebtedness, and, in addition, the interest paid by the state on such bonds.

ARIZONA CODE ANNOTATED, 1939

(Sec. 10-408 Cont'd.)

29, §10, p. 98; R. S. 1913, §5260, in part; rev., R. C. 1928, §2653.)

10-409. *County or municipal bonds by state loan commissioners.*—The boards of supervisors of the counties and the municipal and school authorities, shall report to the state loan commissioners the bonded and outstanding indebtedness of the county, municipality or school district, and, upon the demand of said authorities, the commissioners shall provide for the redeeming or refunding of such indebtedness in the same manner as other state indebtedness, and issue bonds of the state for any indebtedness allowed by law to be incurred by such county, municipality or school district. Such bonds shall be issued upon the faith and credit of the state only to the extent that it will cause to be levied and collected taxes for the payment of the principal and interest of such bonds, and pay the same when such bonds have been issued. The county, municipality, or school district shall pay into the state treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the state board of equalization, or on their failure by the state auditor, to be levied for the payment of the principal and interest of such bonds issued for such county, municipality, or school district, in the same manner as is herein provided for the payment of the principal and interest of state indebtedness. (Laws 1912 (S. S.), ch. 29, §10, p. 98; R. S. 1913, §5260, in part; rev., R. C. 1928, §2654.)

REVISED STATUTES OF ARIZONA, 1913

5261. When the treasurer pays or redeems any indebtedness he shall endorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words "redeemed and cancelled" with the date of cancellation. He shall keep a full and particular account and record of all his proceedings of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings with his annual report, to be by the governor laid before the legislature at its meeting. All books and papers pertaining to the issuance and payment of bonds and interest thereon shall at all times be open to the inspection of the party interested, or to the governor, or committee of either branch of the legislature, or a joint committee of both.

5262. It shall be the duty of the state treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund; provided, that the state auditor shall first draw his warrant on the state treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund.

ARIZONA CODE ANNOTATED, 1939

10-410. *Cancellation of redeemed bonds—Record—Payment of interest.*—When the treasurer pays or redeems any indebtedness he shall indorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words “redeemed and canceled” with the date of cancelation. He shall keep a full record of all bonds redeemed and surrendered, and transmit to the governor an abstract of all his proceedings with his annual report, to be by the governor submitted to the legislature. The treasurer shall pay the interest on said bonds when the same falls due out of the interest fund, if sufficient; if not sufficient, then out of the general fund, for which deficiency the state auditor shall draw his warrant on the state treasurer, payable to the order of said treasurer out of the general fund. (Laws 1912 (S.S.), ch. 29, §§11, 12, p. 98; R. S. 1913, §§5261, 5262; rev., R. C. 1928, §2655.)

REVISED STATUTES OF ARIZONA, 1913

5263. It shall be the duty of said loan commissioners to make a full report of all their proceedings to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the state legislature.

ARIZONA CODE ANNOTATED, 1939

(Omitted in Arizona Code Annotated,
1939.)

REVISED STATUTES OF ARIZONA, 1913

5264. No bond issued under the provisions of this chapter shall be taxed within this state.

ARIZONA CODE ANNOTATED, 1939

(Embodied in Sec. 10-401 (ante) Arizona
Code Annotated, 1939.)

REVISED STATUTES OF ARIZONA, 1913

5265. Whenever the owner of any coupon bond issued pursuant to the provisions of this chapter shall present such bond to the state auditor with a request for the conversion of such bond into a registered bond, the state auditor shall cut off and cancel the coupons of any such coupon bond so presented and shall stamp, print or write upon such bond so presented, either upon the back or the face thereof, as may be convenient, a statement to the effect that the said bond is registered in the name of the owner and that, thereafter, the interest and principal of said bond are payable to the registered owner. Thereafter and from time to time, any such bond may be transferred by such registered owner in person or by attorney duly authorized, on presentation of such bond to the state auditor and the bond again registered as before, a similar statement being stamped, printed or written thereon. Such statement stamped, printed or written upon any such bond may be substantially in the following form:

(Date: giving month, year and day.)

This bond is registered pursuant to the statutes in such case made and provided in the name of..... and the interest and principal thereof are hereafter payable to such owner.

State Auditor.

ARIZONA CODE ANNOTATED, 1939

10-411. *Registration of bonds by owner.*—

Whenever the owner of any such bond shall present it to the state auditor with a request for its conversion into a registered bond, the auditor shall cut off and cancel the coupons, and stamp or write upon such bond that it is registered in the name of the owner and that, thereafter, the interest and principal of said bond are payable to the registered owner only. Such bond may be transferred by such registered owner on presentation to the state auditor, and the bond be again registered. When so registered, the principal and interest of such bond shall be payable to the registered owner. The state auditor shall enter in the register of bonds the registration of each bond and the name of the owner thereof. (R. S. 1913, §5265; rev., R. C. 1928, §2656.)

REVISED STATUTES OF ARIZONA, 1913

(Sec. 5265 Cont'd.)

If any bond shall have been registered as aforesaid, the principal and interest of such bond shall be payable to the registered owner. The state auditor shall enter in the register of said bonds kept by him pursuant to the provisions of this chapter, or in a separate book, the fact of the registration of such bond and in whose name respectively, so that said register or book shall at all times show what bonds are registered and the name of the registered owner thereof.

ARIZONA CODE ANNOTATED, 1939

United States
Circuit Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON and EQUITABLE LIFE
INSURANCE COMPANY OF IOWA,

Appellants,

vs.

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OGLESBY and PHIL ISLEY, constituting the
Board of Supervisors of Maricopa County, Arizona;
SIDNEY P. OSBORN, Governor, ANA FROHMIL-
LER, State Auditor, and JIM BRUSH, State Treas-
urer, constituting the Loan Commissioners of the
State of Arizona; JIM BRUSH, State Treasurer,
and ANA FROHMILLER, State Auditor of the
State of Arizona,

Appellees.

APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

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PAUL P. O'BRIEN,
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and ANA FROHMILLER, State Auditor of the
State of Arizona,
Appellees.

APPELLANTS' REPLY BRIEF

Many assertions made in the statement in Appel-
lees' Brief, pp. 1-22, are not correct. Most of these
statements are in the nature of legal conclusions, so
we will not undertake to deny them categorically.
We think, however, that the statement in Appellants'
Brief, pp. 2-51, correctly sets forth the facts, and any-
thing at variance with that statement, in Appellees'
Brief, is denied by us.

We particularly deny the assertions to the effect that we appeared for our present clients in the mandamus suits, or represented said clients in the taxpayer's suit. Lack of space compels us to limit our reply to the legal propositions asserted in Appellee's Brief.

Appellees' Brief, p. 2

Appellants' view of the *Toole County*, etc. case, is set forth in Appellants' Brief, pp. 88-89.

Appellees' Brief, p. 2 (Note)

The case of *Supervisors v. Hawkins*, was not mentioned in appellants' brief, and has no bearing whatever on the issues of this case. The quotation from the opinion of the court at the bottom of page 2 of Appelles' Brief, is merely a casual reference to Chap. 1, Tit. 52, Rev. Stat. 1913.

Appellees' Brief, p. 6 (B)

Erie R. Co. v. Tompkins, is discussed in Appellants' Brief, pp. 83-93. To this discussion we now add *Meredith v. Winter Haven*, 88 Law ed. 1 (adv.), 64 Sup. Ct. Rep. 7 (Adv).

Appellees' Brief, p. 7

The four authorities cited in the middle of the page, state the rule in diversity of citizenship cases, which has no application to this case.

Appellees' Brief, p. 7 (a)

We are unable to perceive that the four cases at the bottom of page 7, and the top of page 8, have any

application to any of the issues of this case. Appellants contention as to due process will be found in Appellants' Brief, p. 120.

Appellees' Brief, pp. 8-9 (2)

Art. 4, Chap. 60, Rev. Code 1928, was a new statute, materially differing from Chap. 1, Tit. 52, Rev. Stat. 1913. (Appellants' Brief, pp. 36-43, 54-57).

Appellees' Brief, pp. 18-19

The case of *State v. Stewart* does hold that the Code of 1939 is a compiled, and not a revised code, but distinguishes the 1928 code as a revised code, made by the legislature and not by a compiler.

The *Peterson, Walker and Melendez* cases must be considered together with the cases of,

Conway v. State Consolidated Pub. Co.,
57 Ariz. 162, 165; 112 Pac. (2d) 218.

Hunter v. Northern Ariz. Utilities Co.,
51 Ariz. 78, 83; 74 Pac. (2d) 577.

State v. Griffin, 58 Ariz. 187, 191;
118 Pac. (2d) 676.

Appelles' Brief, p. 22

Except for the statement in *Cone v. Rorick*, made in an opinion in which the majority of judges did not concur, the authorities cited at the bottom of this page of Appellees' Brief have no application to this case.

Argument

Appellees' Brief, pp. 23-25 (a) (b)

The cases here cited by appellees present no substan-

tial federal question. They are not in point in our case, by reason of the enactment of a new statute under which the bonds were issued, (Appellants' Brief, pp. 36-43, 54-57), and the passage of the resolutions by the Board of Supervisors and Loan Commissioners, calling appellants' bonds, (Appellants' Brief, pp. 43-44, 57-59, 80-81), the changes made by Art. 4, Chap. 60, Rev. Code, 1928, and the passage of the resolutions, do present a substantial federal question. (Appellants' Brief, pp. 60-89).

Appellees' Brief pp. 25-26 (c)

It was stated in Appellants' opening brief, that the controversy involved principally the interpretation of the contracts created by the issuance of the bonds, and did not present a federal question. This is plain, but the federal question is clearly pointed out to be presented by the attempt to impair the obligation of the bond contract by a subsequently enacted statute and subsequently enacted resolutions. It is this subsequently enacted statute, and these subsequently enacted resolutions, that give jurisdiction to the federal courts. Said courts having jurisdiction, are then required to pass upon the question whether or not there was a contract, and they must determine this according to their independent judgment, for, if they permitted the state court to declare what the contract was, they would fail to exercise the jurisdiction conferred upon them by the federal constitution and statutes. It is settled by an unbroken line of authorities, from *Jefferson Bank v. Skelly*, 1 Black 436, (Appellants' Brief, pp. 75-76) to *Irving Trust Co. v. Day*, 86 Law Ed. 452, (Appellants' Brief, p. 84), that the federal courts must independently determine the terms of

the contract, even though such determination is based wholly upon the interpretation of a state statute.

Appellees' Brief, pp. 26-27 (d)

That a mere breach of contract by a municipal corporation does not constitute impairment of the contract in a constitutional sense, as is held in the three cases cited under this heading, is admitted. But, in this case there was impairment of contract, both by a subsequently enacted state statute (Appellants' Brief, pp. 36-43), and by subsequently enacted resolutions of the Board of Supervisors and State Loan Commission, which undoubtedly impaired the contract created by the issuance of the bonds. (Appellants' Brief, pp. 51-59, 80-81).

Appellees' Brief, p. 28 (e)

The resolutions of the Loan Commissioners and Board of Supervisors are adopted under legislative authority, for the Supreme Court of Arizona has so held.

Maricopa County v. Osborn,

136 Pac. (2d) 270.

The resolution of the Loan Commissioners recites that the Board of Suervisors have demanded that the Loan Commissioners take action under Sec. 10-409 Ariz. Code Ann. 1939. (Trans. p. 174). The proposed notice of redemption calling the outstanding bonds, (Trans. p. 199) was expressly calling to be suf-

ficient under the statutes of the state by the Supreme Court.

Maricopa County v. Osborn,
136 Pac. (2d) 270.

Ariz. Stat. 1913, ceased to exist when Ariz. Rev. Code 1928 was enacted. (Appellants' Brief, pp. 36-43).

Appellees' Brief, p. 29 (a) (b)

The *Appelby* case is directly against appellees' contention. Where a question of impairment of the obligation of a contract is presented the federal courts must determine for themselves what the contract is, even though such determination involves the construction of a state law. (Appellants' Brief, pp. 60-85).

Appellees' Brief, pp. 30-31

It is true that the controversy involves principally the interpretation of the contract created by the issuance of the bonds, but the subsequently enacted statutes and resolutions give jurisdiction to the federal courts so as to require the federal courts to determine independently what the bond contract was.

Appellees' Brief, pp. 31-36 (d)

The bond contract was impaired by the enactment of Art. 4, Chap. 60, Rev. Code 1928. The 1939 Ann. Code made no further change, but action is now being taken under Art. 4, Chap. 60, Rev. Code 1928, now compiled as Art. 4, Chap. 10, Ariz. Code Ann. 1939.

Unquestionably, the newly enacted statute, and the resolutions of the Board of Supervisors and Loan Commissioners, constitute subsequently enacted laws impairing the obligation of the bond contracts. (Appellants' Brief, pp. 36-43, 54-57, 43-44, 57-59, 80-81).

The case of *Garland Co. v. Filmer*, does not support appellees' contention.

The case of *Cochran County v. Mann*, (Appellees' Brief, p. 33), holds that the substitution of the word "may" for "shall", was not a material change. This seems obvious.

The cases of *Cross Lake Shooting, etc. v. Louisiana*, and *Tidal Oil Co., v. Flannagan*, and *Frank v. Magnum*, (Appellees' Brief, pp. 34-35), are cases where no effect was given to a subsequently enacted state law. In our case, appellants' bonds are proposed to be called under the subsequently enacted state law and the resolutions of the Board of Supervisors and Loan Commissioners. If it were not for this subsequently enacted law, and these subsequently enacted resolutions, appellants would continue to collect their interest as heretofore. Thus, this subsequently enacted law and these subsequently enacted resolutions, are the very instruments by which appellants' bonds are being impaired. It is clear that said law and resolutions are agencies of invasion exactly like the cases reviewed on pages 80 and 81 of appellants' brief.

Appellees' Brief, pp. 35-37 (e)

The cases cited under this heading in appellees' brief presented no federal question. That this case does

present such a question is shown on pages 65-87 appellants' brief.

Appellee's Brief, pp. 37-39 (3)

The case of *Erie R. R. Co. v. Tompkins*, and the other cases cited under this heading, have no application, for the reason that this case presents a question of impairment of the obligation of a contract by a subsequently enacted statute, and subsequently enacted resolutions. (Appellants' Brief, pp. 84-89).

Appellees' Brief, 39-42 (4)

The cases cited under this heading by appellees, have no application to the question involved. The State of Washington is bound by and is entitled to the benefits of the bond contracts, but it is entitled to have its rights determined in the federal courts. (Appellants' Brief, pp. 4-5). It appears by its Attorney General. Appellees are not vested with any authority to tell the State of Washington whether it should sue them in the United States District Court of Arizona, or in the United States Supreme Court. The bonds it holds were purchased in the performance of its functions as a sovereign state. When it joined the Union, it surrendered the sovereign power to enforce its rights against the other states by negotiation and by force, and in return for this surrender of these sovereign powers it received the right under the federal constitution, to sue in the federal courts. Of this right the federal courts cannot permit it to be deprived by a friendly suit between Maricopa County and the State Loan Commissioners of Arizona, nor can the federal courts permit this constitutional right of the state to

be frittered away by their natural deference to the Arizona courts. In this case, deference is equally due to both sides and it is the duty of the court to apply the principles of right and equity with regard to the equal level or plane on which all of the states stand. (Appellants' Brief, pp. 89-97).

Appellees' Brief, pp. 42-44 (1)

We do not question the cases cited by appellees under this heading. We call attention, however, to the fact that in none of them were negotiable bonds authorized to be issued under one chapter with definite due dates and actually so issued, held to be callable in violation of their terms, by virtue of an ambiguous provision in another chapter.

State v. Smith, 96 S. W. (2d) 348, 351 (Mo.)

State v. Keith, 66 Pac. (2d), 1059 (Okla.)

Armer v. Wade, 48 Ariz. 1,
68 Pac. (2d) 525.

See also, pages 113-114, Appellants' Brief).

Appellees' Brief, pp. 44-48

The provisions inserted in trust deeds for accelerating maturity of bonds for the benefit of the bondholders, have no application whatever to the issues of this case.

Appellees' Brief, p. 49 (a)

It is true that the new provision in the Act of Cong., June 25, 1890, was inserted for the purpose of

refunding county and municipal debts, but it was not intended to and did not authorize the call of county or municipal bonds before their due dates without the consent of the holders. (Appellants' Brief, Appendix, pp. xii, xi, xiii.) (Also, Appellants' Brief, pp. 111, 112).

Appellees' Brief, pp. 49-50 (b)

The *Schuerman* and *Yavapai County* cases based the right of the bondholders to require the bonds to be refunded upon the territorial act, which did not become a part of the Ariz. Rev. Stat. 1913.

Appellees' Brief, p. 51 (c)

Appellees' statement shows that counsel in this case, who appeared as amicus curiae, was not then correctly informed as to the history of the statute.

Appellees' Brief, p. 52 (a)

Under this heading, appellees take issue with the decision of the Supreme Court in the second mandamus suit, in that appellees say Chap. 1, Tit. 52, Rev. Stat. 1913, specifically applies to all bonds issued subsequently to 1913. The Supreme Court held that it did not apply to the refunding bonds issued under said chapter.

Maricopa County v. Osborn, 136 Pac. (2d) 270. The words, "that is now or hereafter may be authorized by law", were used only with reference to territorial and state bonds. With reference to county and municipal indebtedness, the words used were, "any in-

debtedness now allowed or that may be hereafter allowed by law". (Appellants' Brief, pp. 39-40). These words never authorized refunding of indebtedness thereafter to be created. (Appellants' Brief, pp. 106-109).

Appellees' Brief, p. 53 (b)

The Congressional Act of June 25, 1890 did pledge the credit of the territory for the refunded county obligations. The Act so provides. (Appellants' Brief, pp. 40-43, 108-109). The Committee on Territories so reported the Act. (Appellants' Brief, Appendix p. ii). It is true the counties were not relieved from the payment of the debt, but the territory bound itself to pay the interest and the principal on the bonds. (Appellants' Brief, Appendix, pp. xxxvii, -xl, xli), and the faith and credit of the territory were pledged for the payment of said bonds and the interest. (Appellants' Brief, Appendix, p. xxxiii). Of course, the counties were required to reimburse the territory, but the territory was obligated on the bonds. The Rev. Stat. of 1913 made no material changes in these provisions. Compare Exhibit F with Exhibit G Appendix pp. xx, xxi Appellants' brief. The bonds issued by the territory and the state, for county and municipal indebtedness, were issued in the same form as those issued for territorial indebtedness, as indeed, they had to be, because no other form was authorized by the Act. In 1928, Art. 4, Chap. 60, Rev. Code, 1928, made express provision taking county and municipal bonds out of these provisions.

Appellees' Brief, p. 54 (c)

The *Schuerman* case held as stated by appellees but

this holding was based on a territorial statute which did not become a part of the 1913 code.

The *Boyce* case held as stated by appellees but did not hold that the state was not obligated to pay the bonds.

Board of Supervisors v. Hawkins did not hold as stated by appellees. The opinion merely referred to Chap. 1, Tit. 52, R. S. 1913 as a refunding statute.

Appellees' Brief p. 55 (d)

The legislature of 1927 and 1935 provided for direct refunding of county and state bonds, respectively, and limited such refunding to optional bonds. By these acts the legislature clearly indicated its approval of optional bonds under the prior territorial and state statutes. If appellees' contentions are correct, such optional bonds could not be legally issued. Hence, the legislature in these acts of 1927 and 1935, placed a construction upon Chap. 1, Tit. 52, R. S. 1913 which is binding on the courts. (Appellants' Brief pp. 35-36, 110, 111).

Appellees' Brief, pp. 55-56

The Miami and Nogales bonds do not aid appellees. They were issued in 1942 and the proceedings for their issuance made no attempt to call outstanding bonds without the consent of the holders.

Appellees' Brief pp. 56-57 (e)

The Supreme Court of Arizona held that refunding

bonds are not callable before their due dates. Appellees' statement that Chap. 1 Tit. 52, R. S. 1913 applies to all bonds issued after its effective date is not true.

Maricopa County v. Osborn, 136 Pac. (2d) 270.

Appellees' Brief, pp. 57-58

The principle of prospective operation does not apply to the statute in question. The principle applicable is that the insertion of a statute in a compilation does not change its meaning. (Appellants' Brief pp. 102-104).

Appellees' Brief, pp. 58-59 (f)

Appellees' statement under this heading is too broad. The question of whether provisions of a statute other than the particular statute under which the bonds are issued apply, is a question of legislative intent. Ordinarily when the statute under which bonds are issued is complete in itself, other statutory provisions are held not to apply. (Appellants' Brief, pp. 113-114).

Appellees' Brief, pp. 59-60 (g)

Undoubtedly said chapter provided for the redemption of county bonds but made no provision for calling bonds not due. Such call of bonds, contrary to their terms, does not fall within the term "manner of redemption". (Appellants' Brief pp. 114-115).

Appellees' Brief, pp. 60-62 (h)

Chapters 54 and 86 Ariz. Section Laws 1921 are

primarily acts ratifying the bonds. The arguments and authorities of appellees might have some force if the acts were mere validating acts but the language of Chap. 54 is that the bonds and the contract for their purchase are ratified, approved and declared valid. (Appellants' Brief, Appendix X-LVI). This certainly means that the bonds are declared good as they stand. The bond form was of record, the bonds had been issued and part of them sold. The act was a ratification of the bonds and the contract for their sale, not a mere validation of the proceedings for their issuance. Chapter 86 is less specific but declares the bonds free from any defect. (Appellants' Brief, Appendix pp. L-LI). Appellees' statement that the bond purchase contract could not waive the right to refund the bonds, if such right existed, is true but the ratification of the bonds and bond purchase contract by the state legislature could and did have such effect.

Appellees' Brief, pp. 63-64 (a)

The rule of the cases cited by appellees under this heading is subject to the exception that the rule cannot be allowed to defeat a federal right, (Appellants' Brief, pp. 87-88), and to the qualifications stated in the cases cited in Appellants' Brief, pp. 119-120).

Appellees' Brief, pp. 65-66 (b)

We think it is clear that to hold a person bound by a judgment entered in a suit to which he has not been a party or privy, deprives him of property without due process of law, and that the rule applies to a specific decision of a state court which is out of line with the law of the state. (Appellants' Brief, pp. 119-120).

Appellees' Brief, p. 68 (e)

Chap. 1, Title 52, Rev. Stat. 1913, was originally Act of Cong. June 25, 1890, and became a statute of Arizona by adoption by the State Constitution, and retained its original meaning. (Appellants' Brief, pp. 101, 104).

Appellees' Brief, pp. 69-73

The case of, *Board of Supervisors v. Hawkins*, cited at the bottom of page 69 of appellees' brief, certainly was not a harbinger of the decision of the Supreme Court of the State of Arizona in the two mandamus cases. The fact that amicus curiae briefs were filed does not make the mandamus cases res adjudicata. (Appellants' Brief, pp. 124-125). The appellees' in this case had had no communication with their present counsel when the amicus curiae briefs were filed. The amicus curiae brief of Cox & Cox was filed on behalf of a bond purchaser who urged the Supreme Court to hold that the refunding bonds would be state obligations.

The *Adams Express Co.*, case, at the top of page 73 of Appellees' Brief, simply accepts the decision of a state court to the effect that the law there involved did not violate the state constitution. It does not accept said decision, however, as settling the federal questions involved in that suit.

Appellees' Brief, pp. 73-83 (c) (d)

In support of the propositions advanced under this heading, appellees cite a large number of cases to sup-

port their contention that the taxpayer's suit and the two mandamus suits were *res adjudicata*. The taxpayer's suit was brought by J. L. Gust, one of the counsel for appellants, as a citizen and taxpayer, without consultation with his clients. The complaint in this suit, which is set forth in Appendix No. 1, Appellees' Brief, shows that the purpose of this suit was not to obtain an adjudication that outstanding bonds could not be called, but to have the contract for the purchase of the refunding bonds declared invalid on the ground that it was beyond the power of the Board of Supervisors to grant an option to purchase the bonds, for if the refunding bonds were issued and the outstanding bonds were held not callable, Maricopa County might be subjected to double liability, and if the refunding bonds were not presently issued and the outstanding bonds were held callable, the option price was excessive. The complaint in the taxpayer's suit did not purport to be brought on behalf of other taxpayers.

The case of *Stone v. Bank*, cited on page 74 of appellees' Brief, expressly limits the binding effect of the suit to other taxpayers.

The case of *Luhrs v. City of Phoenix*, cited on page 75 of Appellees' Brief, simply holds that a judgment brought in a representative taxpayer's suit, is binding upon other taxpayers. In that case, no bonds had been issued when either of the cases were decided, and of course, bond holders taking the bonds after the decision in the Luhrs case was made, would be bound thereby as privies to the judgment, but there is nothing in that case, nor in any case that appellees have

cited, to the effect that a bondholder's bonds may be held invalid or depreciated in value by a decision rendered in a taxpayer's suit against public officials. In such cases, the bondholders, having previously acquired their bonds, have a vested property right in them which cannot be destroyed or prejudiced by litigation to which they are not a party. This is evident from the cases cited by appellees. The cases beginning on page 75, and ending on page 78, with a very few exceptions, are taken from the following two notes: 64 *A. L. R.* 1262; 20 *A. L. R.* 1133. An inspection of those notes will show the principle upon which those cases are based, and that the principle has no application to this case.

On pages 78 and 79 is the statement that J. L. Gust appeared on behalf of the bondholders, as shown by his own admission. That statement is not true. He did make a statement that he represented a bondholder, but at that time he did not represent the appellants in this case, nor did he represent bondholders generally.

The cases cited in Appellees' Brief, at the bottom of page 79, and on pages 80 and 81, have no application to the facts of this case. This is established by the cases cited on pages 123-125 of appellants' brief. To these cases we add the following:

Bigelow v. Old Dominion Copper Co.,
 225 U. S. 111;
 56 L. ed. 1009;
 32 Sup. Ct. Rep. 641.

Litchfield v. Goodnow, 123 U. S. 549;
 31 L. ed. 199;
 8 Sup. Ct. Rep. 210.

Stryker v. Goodnow, 123 U. S. 527;
 31 L. ed. 194;
 8 Sup. Ct. Rep. 203.

Rumford Chemical Works v. Hygenic Chemical
 Co.,
 215 U. S. 156;
 54 L. ed. 137;
 30 Sup. Ct. Rep. 45.

Brown-Crummer v. Paulter, 70 Fed. (2d) 184

Garland Co., v. Filmer, 1 Fed. Sup. 8-13.

In re, Board of Education v. City of Perry,
 130 Pac. 951.

On this whole question, see *Note* 130, *A. L. R.* 9,
 which reviews the cases and shows there is no merit
 in appellees' contention on this point.

Appellees' Brief, pp. 83-89 (2)

There are two answers to the statement that whether the judgment of a state court is *res adjudicata*, is purely a question of state law and the federal courts are bound thereby.

The first is, there is nothing in the law of Arizona holding that either the judgment in the taxpayer's suit or the judgment in the mandamus suits are *res adjudicata* as to the bondholders.

The case of, *Luhrs v. City of Phoenix*, simply holds

that the judgment in a representative taxpayer's suit is binding upon other taxpayers. In that case no bonds were issued at the time the opinion in the *Luhrs* case was written, so, of course, the case could not possibly be a decision to the effect that where a bondholder had previously purchased his bonds and has a personal, vested right by reason of the ownership thereof, this property right might be taken from him by a decision to which he was not a party. The fact that an attorney had previously appeared as *amicus curiae*, who later became an attorney for the appellants, does not bind the appellants, is held by a number of cases, including the case of *Garland v. Filmer*, 1 Fed. Sup. 8, 13, which is cited by appellees on page 32 of their brief.

Second, the rule stated by appellees that whether the judgment of a state court is *res adjudicata*, is purely a question of state law, and the federal courts are bound thereby, is subject to the exception that where a federal question is presented, the rule does not apply.

Postal Telegraph Cable Co., v. Newport,
247 U. S. 464, 475;
82 L. ed. 1215;
38 Sup. Ct. Rep. 566.

In this case the court says:

“And, as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard,

(*Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572. *Scott v. McNeal*, 154 U. S. 34, 46. 38 L. ed. 896, 901. 14 Sup. Ct. Rep. 1108. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 423. 59 L. ed. 1027, 1031, 35 Sup. Ct. Rep. 625, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.”

The Supreme Court of the United States holds that a public body like the Board of Supervisors or the State Loan Commission, in this case, may not take a writ of certiorari to the Supreme Court of the United States upon the ground that the judgment of the Supreme Court of Arizona would deprive the bondholders of their property without due process of law, or would impair the obligation of their contract.

Braxton County v. W. Va. 208 U. S. 192, 197;
52 L. ed. 450; 28 Sup. Ct. Rep. 275.

Lampasas v. Bell, 180 U. S. 276, 283;
45 L. ed. 527; 21 Sup. Ct. Rep. 368.

Smith v. Indiana, 191 U. S. 138, 148;
48 L. ed. 125; 24 Sup. Ct. Rep. 51.

Columbus, etc. Co., v. Miller,
283 U. S. 96, 99;
75 L. ed. 861, 865; 51 Sup. Ct. Rep. 392.

Appellees suggest, on page 87 of their brief, that the case of *Board of Liquidation v. Louisiana*, is conclusive of this case. It was held on the facts in that case that the Supreme Court would accept the decision of the state court that the drainage commission and the board of liquidation had the right to attack the judgment of the state court on the ground that said judgment, while purporting to protect the rights of the bondholders, would in fact violate those rights. The court, in its opinion, evidently did not consider this decision at variance with the group of cases cited just above. We do not think it is inconsistent, but the point is immaterial for the purposes of this case, because, to hold that the decision made in the state court for the purpose of protecting the rights of the state's boards and agencies, is far from holding that such a decision is binding upon the bondholders when they assert their independent property rights. It is often the case that a court may determine the rights of the parties before it by a decision that will not be binding on other persons who are not parties to the suit. The whole question of alleged prior adjudication is disposed of by the cases cited on pages 123-125 of Appellants' Brief, to which we add the case of, *Chase Nat. Bank v. Norwalk*, 291 U. S. 431; 78 L. ed 894, 54 Sup. Ct. Rep. 475.

It is respectfully submitted that appellees' brief fails to set up any defense to appellants' opening brief, and that the case must be considered by this court on

its merits, and upon such consideration, judgment must be entered in favor of the appellants.

Respectfully submitted,

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State of Washington,

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By.....
J. L. Gust

No. 10504

United States
Circuit Court of Appeals
For the Ninth Circuit.

RIDDER BROTHERS, Incorporated,
a Corporation,

Appellant,

vs.

RAE KINGSLEY BLETHEN, F. D. HAMMONS
and WILLIAM K. BLETHEN, as Executors
of the Estate of Clarence B. Blethen, Deceased;
RAE KINGSLEY BLETHEN, FRANCIS A.
BLETHEN; WILLIAM K. BLETHEN;
JOHN ALDEN BLETHEN; CLARANCE B.
BLETHEN; THE BLETHEN CORPORA-
TION, a Corporation; and SEATTLE TIMES
COMPANY, a Corporation

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

FILED
SEP - 1 1943

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Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the Western District
of Washington, Northern Division

No. 613

RIDDER BROTHERS, Incorporated,
a corporation

Plaintiff

vs.

RAE KINGSLEY BLETHEN, F. D. HAM-
MONS and WILLIAM K. BLETHEN as
executors of the Estate of Clarence B. Blethen,
Deceased, RAE KINGSLEY BLETHEN,
FRANCIS A. BLETHEN, WILLIAM K.
BLETHEN, JOHN ALDEN BLETHEN,
CLARENCE B. BLETHEN, THE
BLETHEN CORPORATION, a corporation,
and SEATTLE TIMES COMPANY, a cor-
poration,

Defendants

COMPLAINT

Comes now the plaintiff above named and for
cause of action against the defendants and each of
them, alleges as follows, to-wit:

I.

That plaintiff Ridder Brothers, Incorporated, is
a corporation organized under the laws of the State
of New Jersey.

II.

That defendant The Blethen Corporation is a cor-
poration organized under the laws of the State of

Washington, and that the defendant Seattle Times Company is a corporation organized under the laws of the State of Delaware.

III.

That Rae Kingsley Blethen, F. D. Hammons and William K. Blethen are the duly appointed, qualified and acting executors of the estate of Clarence B. Blethen, Deceased.

IV.

That the matter in controversy in this action exceeds, exclusive of interest and costs, the value of \$3000.00.

V.

That on December 30, 1929, C. B. Blethen as party of the first part, Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag as parties of the second part and Bernard H. Ridder, Joseph E. Ridder and Victor F. Ridder, copartners doing business under the firm name and style of Ridder Brothers, as [1*] parties of the third part, entered into a contract, a copy of which is hereto attached, marked Exhibit A, and by this reference made a part hereof as though set forth in full herein. That thereafter and on the 4th day of January, 1930, and on the 1st day of February, 1930, the parties to said contract entered into agreements modifying and amending the same, true and correct copies thereof being hereto attached, marked Exhibits B and C, and by this reference made a part hereof as though set forth in full herein.

*Page numbering appearing at foot of page of original certified Transcript of Record.

VI.

That on said 30th day of December, 1929, said C. B. Blethen and said Bernard H. Ridder, Joseph E. Ridder and Victor F. Ridder, as copartners doing business under said firm name and style of Ridder Brothers, entered into a contract termed supplemental to said hereinbefore mentioned contract of December 30, 1929, the said Blethen being referred to in said contract as "Blethen" and the said Ridders being referred to therein as "Ridder Brothers", a copy of said supplemental contract, marked Exhibit D, being hereto attached and by this reference made a part hereof as though set forth in full herein. That said supplemental contract was modified and amended by agreements entered into by and between the parties hereto on the 15th day of January, 1930, the 1st day of February, 1930, and the 30th day of June, 1930. That copies of said modifying and amending agreements, marked Exhibits E, F and G respectively, are hereto attached and by this reference made a part hereof as though set forth in full herein.

VII.

That said supplemental contract of December 30, 1929, as modified and amended as aforesaid, provides in part as follows:

"Fourth: Ridder Brothers, Incorporated, a New Jersey corporation, the majority of the capital stock of which is owned by said Ridder Brothers, shall enter into a [2] management contract with Seattle Times Company, a Delaware Corporation,

whereby said Ridder Brothers, Incorporated, Through its officers, agents and employees, will furnish to Seattle Times Company, for a period of five (5) years, such services and management in the conduct of the business of said Seattle Times Company as may be required of it by the Board of Directors of said Seattle Times Company, and the said Ridder Brothers, Incorporated, shall receive annually therefor, as management compensation, the sum of Twenty-five Thousand Dollars (\$25,000.) and no more. Such management contract shall also contain a provision that said Ridder Brothers shall not engage or become interested directly or indirectly, in any other newspaper, advertising or general publishing business, in the State of Washington, except with the consent of Blethen."

"Fifth: Blethen shall not, for a period of twenty-one years from December 30, 1929, sell, assign, transfer, pledge or hypothecate any of the Class B common stock of such Delaware corporation owned by him so as to reduce his holdings of such Class B common stock to less than fifty-one (51) per cent of such Class B common stock at any time issued or outstanding, except that nothing herein contained shall be deemed to prevent or prohibit Blethen from transferring not less than fifty-one (51) per cent of such Class B common stock at any time issued or outstanding to a holding corporation to be formed by him, in which holding corporation he shall at all times own not less than sixty (60) per cent of the voting stock, provided such holding corporation shall not, for a period of

twenty-one (21) years from December 30, 1929, sell, assign, transfer, pledge or hypothecate any of such Class B common stock of Seattle Times Company, a Delaware corporation.”

“Eighth: Blethen agrees, immediately after the issuance of Class B common stock to him, to make a last Will and Testament, or some other instrument, in writing, which will provide in effect that his Class B common stock be held in trust by his trustees after his death for a period of twenty-one (21) years from December 30, 1929. Such last Will and Testament or other trust instrument shall also provide that Blethen’s Class B common stock shall not be sold by his trustees until the termination of such trust. Such last Will and Testament or other trust instrument shall constitute, nominate and appoint the widow of said Blethen as one of the trustees, Bernard H. Ridder, another of such trustees, and Elmer E. Todd, the third of such trustees. It shall further provide that, in the event of the death, resignation or disability of his widow at any time, the vacancy caused thereby shall not be filled but the surviving trustees shall act. In the event of the death, resignation or disability of Bernard H. Ridder at any time, one of his brothers shall act as trustee in his place and stead, and in the event of the death, resignation or disability of Elmer E. Todd at any time, one of the partners of the law firm now representing Blethen shall act as trustee in his place and stead. Such last Will and Testament or other trust instrument shall also provide that upon the termination of the trust, Bleth-

en's Class B common stock shall be distributed by the trustees among the surviving sons of said Blethen and the issue of such of them as may be deceased, in equal shares, per stirpos. Such last Will and Testament, or [3] other trust instrument, shall further provide that, in case of any difference or differences of opinion between the said trustees as to any question connected with the management of the corporation, the Class B common stock of which is to constitute the corpus of the trust, any trustee may submit such a question for arbitration, upon notice of the other trustees, to the then general manager of The Associated Press, and in any such case the decision of the said then general manager of The Associated Press shall be final and conclusive and be binding upon all of said trustees. Provided, however, that if said Blethen transfers, to a holding corporation to be formed by him, any of his Class B common stock in Seattle Times Company, a Delaware corporation (not less, in any event, than fifty-one (51) per cent of such stock at any time issued and outstanding), as permitted by the Fifth paragraph of the agreement of December 30, 1929, as herein modified, his last Will and Testament shall contain suitable provision that no less than sixty (60) per cent of the voting stock of such holding corporation shall pass to the trustees above named, to be held in trust for the same period and under the same terms and conditions hereinabove provided."

"Fifteenth: Ridder Brothers may assign this contract and all their right, title and interest there-

under to a corporation organized or to be organized by them in which they own over sixty per cent of all of the issued capital stock.”

VIII.

That said contract and said supplemental contract contemplates the acquisition by said Seattle Times Company, the corporation to be organized as therein provided, of the newspaper at the time owned by Seattle Times, Incorporated, a corporation organized under the laws of the State of Nevada, and by said corporation published in the State of Washington; and contemplated ownership of stock in said Seattle Times Company by said C. B. Blethen and said Ridder Brothers as in said contract provided, and participation in the affairs of said company, having in mind particularly the publication of said newspaper, by said C. B. Blethen and said Ridder Brothers as in said contracts provided.

IX.

That said Ridder Brothers and Ridder Brothers, Incorporated, have done all acts and things required of them to date under and by virtue of said contracts and agreements. [4]

X.

That said Seattle Times Company was organized as a Delaware corporation on or about January 18, 1930; and on or about February 1, 1930, became the owner of said newspaper and has at all times since and is now the owner and publishers thereof.

XI.

That the certificate of incorporation of said Seattle Times Company provided for several classes of stock, one thereof being designated as Class B common stock. That said certificate provided for 1,000 shares of said stock and provided that the same should have full voting rights, subject to the rights of the holders of preferred stock provided for in said certificate in the event of default in the payment of dividends on such preferred stock. That upon the completion of the incorporation of said Seattle Times Company, 550 shares of said Class B common stock was issued to said C. B. Blethen; 440 shares to said Ridder Brothers; and 10 shares to one Elmer E. Todd. That the present market value of said stock is in excess of \$1500.00 per share.

XII.

That shortly prior to the incorporation of said Seattle Times Company, the said Ridder Brothers caused to be organized said Ridder Brothers, Incorporated, and thereafter and sometime subsequent to December 30, 1929, duly assigned by an instrument in writing said contract and said supplemental contract, as modified and amended and all their right, title and interest therein and all benefits acquired thereunder, to said Ridder Brothers, Incorporated, and caused to be transferred to said Ridder Brothers, Incorporated, their said 440 shares of said Class B common stock in said Seattle Times Company; and as a part of said assignment, said Ridder Brothers, Incorporated, agreed with

said Ridder Brothers to perform and discharge all the terms and obligations assumed, or to [5] be performed or discharged, by said Ridder Brothers under said contracts as modified and amended. That on or about September 19, 1932, said C. B. Blethen sold and transferred 55 shares of his said Class B common stock to said Ridder Brothers, Incorporated. That said Ridder Brothers, Incorporated, has at all times since and is now the owner of 495 shares of said Class B common stock.

XIII.

That sometimes following the incorporation of said Seattle Times Company, said C. B. Blethen caused The Blethen Corporation to be organized and caused to be transferred to said The Blethen Corporation 455 shares of his said Class B common stock, and one share to his wife Rae Kingsley Blethen, retaining in his own name 39 of such shares.

XIV.

That on or about June 28, 1930, said C. B. Blethen delivered to said Ridder Brothers copy of proposed agreement modifying and amending said supplemental contract and draft of will proposed to be made by said C. B. Blethen in compliance with said supplemental contract as amended by said proposed agreement. That on July 3, 1930, said Ridder Brothers notified said C. B. Blethen that said proposed agreement and will were satisfactory. That said proposed agreement was entered into on the 30th day of June, 1930, and is the agreement al-

leged in paragraph VI hereof. That said proposed will contained amongst others the following provisions:

“First: I give and bequeath all of my personal effects and jewelry, all of my household furniture and library, all of my automobiles, and my yacht, including all of its furnishings. to my wife, Rae Kingsley Blethen.

“Second: I give, bequeath and devise all of the residue of my estate, of every kind and nature, real, personal and mixed, of which I shall be possessed at the time of my decease, to my wife, Rae Kingsley Blethen, Elmer E. Todd, of Seattle, Washington and Bernard H. Ridder, of New York City, hereinafter called “trustees”, [6] and to their successors in said trust, In Trust, for the following uses and purposes:

“5. During the continuance of said trust the title, possession and control of all of the common capital stock of The Blethen Corporation embraced in said trust shall be vested in said trustees. Said trustees shall have no power to sell, pledge hypothecate or encumber said stock prior to the 30th day of January, 1951.

“6. Said trustees shall vote all of the Class B common capital stock of Seattle Times Company which is owned by The Blethen Corporation as a unit at all corporate meetings of Seattle Times Company except where cumulative voting is permitted. A majority of said trustees shall have the power of decision as to the way in which said Se-

attle Times Company Class B common stock shall be voted, except as provided in paragraph 7 of this article.

“7. In case of any difference of differences of opinion between said trustee as to any question connected with the management of Seattle Times Company, a majority of the Class B common stock of which company is owned by The Blethen Corporation, the majority of whose voting stock is owned by me, then any trustee may submit such question for arbitration, upon notice to the other trustees, to the then General Manager of The Associated Press, in which case the decision of the said then General Manager of The Associated Press shall be final, conclusive and binding upon said trustees and said stock shall be voted by said trustees in accordance with said decision.

“8. During the continuance of said trust title, possession, control and disposition of all of the property embraced in said trust, other than the capital stock in The Blethen Corporation, shall vest in said trustees. Said trustees are given power and authority to manage, control, sell, convey, exchange, lease, mortgage, pledge and otherwise dispose of any and all of said trust property, except the capital stock of The Blethen Corporation, on such terms and for such considerations as they may think fit, and if any of said property be sold, exchanged, collected or otherwise converted into cash or other property, said trustees are hereby given power and authority to reinvest the proceeds in securities or property of such character as they shall deem best, with power of continuance, investment,

management, control, sale, conveyance, exchange, leasing, mortgaging, pledging and other disposition. Said trustees shall not be restricted to investment or reinvestment in securities of the character authorized by the law of any state for trust investments. No persons dealing with said trustees shall be required to see to the application of any money paid or delivered to such trustees. As to the capital stock in The Blethen Corporation, after January 30, 1951, the trustees shall have the same powers of sale and disposition as are hereinabove conferred as to the other trust property. [7]

“10. The income derived from all of said trust property, after deducting all charges and expenses, including charges and compensation of said trustees, shall be paid quarterly by said trustees as follows: One-half ($\frac{1}{2}$) of said income to my wife, Rae Kingsley Blethen, during her lifetime; the other one-half ($\frac{1}{2}$) of said income to my children, Francis A. Blethen, Clarence B. Blethen, Alden J. Blethen, William K. Blethen and John Alden Blethen, share and share alike.

“11. If my wife, Rae Kingsley Blethen, shall die before the 30th day of January, 1951, then thereafter, during the continuance of said trust, all of said income from said trust property shall be paid quarterly by said trustees to my children, Francis A. Blethen, Clarence B. Blethen, Alden J. Blethen, share and share alike.

“12. All of the property embraced in said trust and remaining therein at the termination of said trust shall be distributed by the trustees there-

of to my children, Francis A. Blethen, Clarence B. Blethen, Alden J. Blethen, William K. Blethen and John Alden Blethen, share and share alike.

“13. If any of my said children shall die before the termination of said trust leaving surviving him either a widow or children, then the share of either income or principal that said deceased child, if living, would have received from said trust estate shall pass to and be paid or distributed to his surviving widow and/or children, share and share alike.

“14. If any of my said children shall die before the termination of said trust leaving no widow or issue, then any share of income or principal that said deceased child, if living, would have received shall pass to and be paid or distributed to his surviving brothers, share and share alike.

* * * * *

“Third: 1. I hereby appoint my wife, Rae Kingsley Blethen, Elmer E. Todd, of Seattle, Washington, and Bernard H. Ridder, of New York City, executors of this my Last Will and Testament and I direct that no bond be required of them as such executors; Provided, that if, for any reason, my wife, Rae Kingsley Blethen, does not qualify as executrix or shall cease to be such executrix, then the vacancy created thereby shall not be filled: Provided, further, that any vacancy in the executorship to which Elmer E. Todd is appointed shall be filled by the appointment of The Pacific National Bank of Seattle, Washington: and Provided further, that any vacancy in the executorship to which Ber-

nard H. Ridder is appointed shall be filled, first, by the appointment of his brother, Joseph E. Ridder, of New York City, and, second, by the appointment of his brother, Victor F Ridder, of New York City.

“2. I direct that during the administration of [8] my estate said executors shall vote the Class B common capital stock of Seattle Times Company owned by The Blethen Corporation as a unit at all corporate meetings, except where cumulative voting is permitted, and that a majority of my said executors shall have the power of decision as to the way in which said stock shall be voted, except as provided in paragraph 3 of this Third article.

“3. In case of any difference or differences of opinion between said executors as to any question connected with the management of Seattle Times Company, a majority of the Class B common stock of which company is owned by The Blethen Corporation, the voting control of which latter company will be in me at the time of my death, then any executor may submit such question for arbitration, upon notice to the other executors, to the then General Manager of The Associated Press, in which case the decision of said then General Manager of The Associated Press shall be final, conclusive and binding upon said executors and said executors shall vote said stock in accordance with such decision.”

XV.

That said C. B. Blethen died on the 30th day of October, 1941, and owned at the time of his death

39 shares of said Class B common stock of said Seattle Times Company and in excess of 60% of the voting stock of said The Blethen Corporation which in turn then owned 455 shares of said Class B common stock of said Seattle Times Company. That he left surviving him four sons, Francis A. Blethen, William K. Blethen, John Alden Blethen and Clarence B. Blethen, and that all four sons are living at this time. That one son, said Alden J. Blethen, predeceased said C. B. Blethen without leaving any widow or issue surviving him.

XVI.

That following the death of said C. B. Blethen there was filed in Superior Court of the State of Washington for King County a will which had been made by said C. B. Blethen on the 4th day of December, 1940; that thereafter said will was proved and allowed by said court, and said Rae Kingsley Blethen, F. D. Hammons and William K. Blethen were appointed executors under said will and at all times since have been and are now the qualified [9] and acting executors of said estate. That said executors now have possession of said 39 shares of said Seattle Times Company and possession of all of the voting stock that said C. B. Blethen owned at the time of his death in said The Blethen Corporation, and presume to have full power to vote all of the said stock at stockholders' meeting of said corporation.

XVII.

That neither said Ridders nor any thereof nor said Ridder Brothers, Incorporated, knew of said will until after the same had been filed for probate; that they assumed at all times until the filing of said will that said C. B. Blethen's will was as called for by the contracts and agreements hereinbefore referred to and as set forth in the copy of the will furnished to them on or about said 28th day of June, 1930, except for the substitution of Joseph E. Ridder for Bernard H. Ridder as one of the trustees which had been agreed upon by and between said C. B. Blethen and said Ridders.

XVIII.

That said will of said Blethen filed and allowed to probate as aforesaid provided in part as follows:

“Article First: I give and bequeath all of the Common Capital Stock of The Blethen Corporation and all of the Class A, Class B and Preferred Capital Stock of the Seattle Times Company of which I may be possessed at the time of my death, to my wife, Rae Kingsley Blethen, Elmer E. Todd, of Seattle, Washington, and Joseph E. Ridder of New York City, hereinafter called ‘Trusteex’ and to their successors in said trust, in trust for the following uses and purposes:

“(1) Said trust shall continue and terminate upon the death of my wife, Rae Kingsley Blethen, or upon the 30th day of January, 1941, whichever is later.

“(9) Said Trustees shall vote as a unit all of the Capital Stock of Seattle Times Company then having voting powers which is owned by The Blethen Corporation and/ or by said Trustees at all corporate meetings of Seattle Times Company. A majority of said Trustees shall have [10] the power of decision as to the way in which the Seattle Times Company Capital Stock then having voting powers and held by the Trustees shall be voted, except as provided in paragraph (10) of this Article, and a majority of said Trustees shall have the power of decision on all questions pertaining to the management of said trust estate, except as provided in paragraph (10) of this Article.

“(10) In case of any difference or differences of opinion between said Trustees, arising during the period prior to the 30th day of January, 1951, as to any question connected with the management of Seattle Times Company, then any Trustee may submit such question for arbitration, upon notice to the other Trustees, to the then General Manager of The Associated Press, in which case the decision of the then General Manager of The Associated Press shall be final, conclusive and binding upon said Trustees, and the voting stock of the Seattle Times Company then owned by said Trustees and/or by The Blethen Corporation shall be voted by said Trustees in accordance with said decision.

(11) The income derived from all of said trust property, after deducting the charges and expenses, including the charges and compensation of said

Trustees, shall be distributed, perferably monthly, by my said Trustees as follows:

One-half of said income to my wife, Rae Kingsley Blethen; one-sixth of said income to my son, Francis A. Blethen; one-sixth of said income to my son William K. Blethen; and one-sixth of said income to my son John Alden Blethen;

provided that if any of my sons have not yet reached the age of thirty (30) years at the time the distribution of any income is made, said Trustees may at their absolute discretion withhold part or all of the income which might be distributed to said son under the age of thirty (30) years, and said income so withheld shall be placed in a separate fund and thereafter may be distributed by said Trustees in their discretion to the son from whom it has been withheld at any time before he reaches the age of thirty (30) years, but upon his reaching the age of thirty (30) years any undistributed income remaining in said special fund shall be distributed to said son by said Trustees.

“(12) In case the death of my wife, Rae Kingsley Blethen, before the 30th day of January, 1951, the Trustees shall thereafter distribute all of the income from the trust as follows:

One-third of said income to my son Francis A. Blethen; one-third of said income to my son William K. Blethen; and one-third of said income to my son John Alden Blethen.

* * * * *

“(14) All of the property embraced in said trust and remaining therein at the termination of

said [11] trust shall be distributed by the Trustees thereof to my sons, as follows:

One-third of said property to my son Francis A. Blethen; one-third of said property to my son William K. Blethen; and one-third of said property to my son John Alden Blethen.

“(15) If any of my said sons, Francis A. Blethen, William K. Blethen and John Alden Blethen, shall die before the termination of said trust leaving surviving him either a widow or issue, then the share of either income or principal that said deceased child, if living, would have received from said trust estate, shall pass to and be paid or distributed to his surviving widow and/or issue, if any, share and share alike. If at the termination of said trust none of my said sons shall be living, then I direct that an equal share of the trust property be set aside with respect to each of my said sons having at that time a widow and/or issue him surviving, and each such share shall be distributed to such surviving widow and/or issue, share and share alike.

“(16) If any of my said sons, Francis A. Blethen, William K. Blethen and John Alden Blethen, shall die before the termination of said trust leaving no widow or issue, then any share of the income or principal which said deceased child, if living, would have received upon such termination, shall be paid and distributed by the Trustees to the survivor or survivors of my said three sons, share and share alike.

“Article Fourth: (1) I hereby appoint my wife, Rae Kingsley Blethen, F. D. Hammons of Seattle, Washington, and my son William K. Blethen of Seattle, Washington, Executors of this My Last Will and Testament; Provided, that if for any reason my wife, Rae Kingsley Blethen, does not qualify as Executrix or shall cease to act as such Executrix, then the vacancy created thereby shall not be filled; Provided Further, that any similar vacancy in the executorship to which F. D. Hammons is appointed shall be filled by Dietrich Schmitz of Seattle, Washington; Provided Further, that any similar vacancy in the executorship to which William K. Blethen is appointed shall be filled by his brother, John Alden Blethen of Seattle, Washington. I direct that no bond be required of any of my executors.

“(2) I direct that during the administration of my said estate, my executors shall vote the voting stock of the Seattle Times Company owned by The Blethen Corporation and/or by my said Executors as a unit and that a majority of my said Executors shall have the power of decision as to the way in which said stock shall be voted, and a majority of my said Executors shall have the power of decision on all other questions pertaining to the administration of my said estate.

“(3) My executors, until distribution, owning and holding all my stock in The Blethen Corporation, [12] shall have and exercise the uncontrolled power and authority to vote said stock and to act, either as stockholders or directors of said corporation, to pledge or mortgage the securities, proper-

ties and moneys owned by said corporation, and to borrow moneys in its behalf, and to transfer by way of gift or otherwise to my estate any assets or moneys of said corporation, to such extent as in their judgment and discretion is, from time to time, necessary or proper or advisable to furnish my estate with adequate funds to carry out my Will, including the payment of federal estate and succession taxes and state inheritance taxes and expenses of administration, and all obligations of and charges against my estate. In addition to all the foregoing powers, my said Executors shall have the uncontrolled power and authority to guarantee or assume any and all obligations or indebtedness of The Blethen Corporation, and to in any manner reorganize, liquidate or dissolve, in whole or in part, The Blethen Corporation, and to distribute in whole or in part, its corporate assets to themselves as Executors and to any other stockholders of said corporation; provided that if The Blethen Corporation is liquidated or dissolved by my Executors as above authorized, then my said Executors may satisfy the legacy of Article First of my Will, as respects stock of The Blethen Corporation, by distributing to my Trustees therein named the property coming into the hands of my said Executors upon the liquidation of The Blethen Corporation and remaining after the payment of all obligations and charges against my estate, including expenses of administration; provided, however, that my Executors shall not, prior to the 30th day of January, 1951, sell, pledge, hypothecate or encumber any of the Class B Common Stock of Seattle

Times Company, without the consent of Ridder Brothers, Incorporated.”

XIX.

That said last will and testament of C. B. Blethen, Deceased, as hereinabove alleged and set forth, breached the requirements of the contracts and agreements made and entered into between the parties as hereinabove set forth in at least two respects, to-wit: (1) In that the right to vote the said 39 shares of said Class B common stock in said Seattle Times Company, and the right to vote all of the shares of the voting common stock of The Blethen Corporation owned by the said C. B. Blethen at the time of his death is by the terms and provisions of the said last will and testament, vested in the executors of the estate during the period of administration rather than in the said trustees; (2) In that said last will and testament provides that upon the termination [13] of the trust all of the property remaining therein shall be distributed to Francis A. Blethen, William H. Blethen and John Alden Blethen, surviving sons of the said C. B. Blethen, to the exclusion of Clarence B. Blethen, who was also a surviving son of the said C. B. Blethen.

XX.

That at all times since the date of death of the said C. B. Blethen, Rae Kingsley Blethen, Elmer E. Todd and Joseph E. Ridder as Trustees, have been and are now entitled to vote the said 39 shares of the said Class B common stock of the said Se-

attle Times Company and the said voting common stock of The Blethen Corporation owned by the said C. B. Blethen at the time of his death, but that they have not done so nor have they made any effort to do so save and excepting said Joseph E. Ridder. That plaintiff has heretofore demanded of the said Rae Kingsley Blethen, Elmer E. Todd and Joseph E. Ridder, Trustees, that they as such trustees carry out whatever steps might be necessary to enable them to vote said stock and to participate in the management of the Seattle Times Company, pursuant to and as provided for in the contracts and agreements hereinbefore referred to. That said trustees have failed, refused and neglected and now fail, refuse and neglect to do so, save and excepting said Joseph E. Ridder. That plaintiff has no plain, speedy or adequate remedy at law and consequently is compelled to seek relief through this action in equity.

XXI.

That on the 20th day of January, 1942, the annual meeting of the stockholders of said Seattle Times Company was held in the City of Seattle in the State of Washington at which all of the 1000 shares of said Class B common stock were purportedly represented. That said Ridder Brothers and said Ridder Brothers, Incorporated, owners and holders of 495 shares of said Class B [14] Common stock attended said meeting and voted said stock.

That the defendant executors, Rae Kingsley Blethen, Elmer E. Todd and The Blethen Corporation presumed to represent 505 shares of the said Class

B Common stock and by voting or attempting to vote the same, controlled the said meeting. That included in said 505 shares were 494 shares that should have been voted by Rae Kingsley Blethen, Elmer E. Todd and Joseph E. Ridder as trustees, acting personally and through The Blethen Corporation.

That at said meeting, four directors of the Seattle Times Company, constituting a majority of the Board of Directors, were purportedly elected by the cumulative votes of the defendant executors, Rae Kingsley Blethen, Elmer E. Todd and The Blethen Corporation, which directors have ever since been and now are acting as duly elected and qualified directors of said corporation. That said directors have at all times been and now are under the control of the defendant executors, The Blethen Corporation, Elmer E. Todd and Rae Kingsley Blethen.

That on the 20th day of January, 1942, and immediately following the adjournment of said stockholders' meeting, the Board of Directors of said company met. That at said meeting differences of opinion developed as to the management of said corporation and of the said newspaper being published by it. Said defendant executors, The Blethen Corporation, Elmer E. Todd and Rae Kingsley Blethen, were of the opinion that Elmer E. Todd should be the president of said company and the publisher of said newspaper although Elmer E. Todd was without experience as a publisher of a newspaper. That said Ridder Brothers and said Ridder Brothers Incorporated, acting through the directors favorable to them, but constituting a mi-

nority of the Board of Directors, attempted to bring about the election of Joseph E. Ridder as said president and said publisher. That the said Joseph E. Ridder is experienced and able in the newspaper publishing business, and that said Ridder Brothers and Ridder Brothers Incorporated were of the opinion that Joseph E. Ridder should be the president of said [15] company and the publisher of said newspaper. That by virtue of the fact that the Board of Directors was controlled as aforesaid, Ridder Brothers and Ridder Brothers Incorporated were unable to bring about such election, and the Board of Directors purported to elect the said Elmer E. Todd as said president and said publisher, and he has since been and is now acting as said president and said publisher.

That since the meetings of said stockholders and said directors on said 20th day of January, 1942, other differences have developed as between the stockholders aforesaid and said Ridder Brothers, particularly said Joseph E. Ridder, and said Ridder Brothers, Incorporated, as to the management of said Seattle Times Company and said newspaper. That all these differences have been settled in harmony with the views of the stockholders aforesaid and contrary to the views of said Ridder Brothers, and particularly said Joseph E. Ridder, and said Ridder Brothers, Incorporated.

XXII.

That the estate of said C. B. Blethen is now in probate proceedings and it is alleged that it will be

in such proceedings for at least a year; and that during all of said time said executors will presume to have full control over said Class B Common stock of said Seattle Times Company and of said voting stock of said The Blethen Corporation with full power to vote said stock at meetings of stockholders.

Wherefore, Plaintiff prays:

1. For the judgment and decree of the Court that said Rae Kingsley Blethen, F. D. Hammons and William K. Blethen as executors under said will of said C. B. Blethen forthwith cause to be transferred to said Rae Kingsley Blethen, Elmer E. Todd and Joseph E. Ridder as trustees under the last will and testament of [16] C. B. Blethen, deceased, thirty-nine shares of the Class B common stock of Seattle Times Company, a Delaware corporation, and all of the shares of the voting common stock of The Blethen Corporation, a Washington corporation, in the possession of and held by them as said executors under said last will and testament; and that said executors forthwith surrender the certificate or certificates in their possession, evidencing said thirty-nine shares of said Class B common stock of said Seattle Times Company, and forthwith surrender the certificate or certificates in their possession evidencing said voting common stock to said The Blethen Corporation, with instructions to the officers of said Seattle Times Company to issue a new certificate evidencing said thirty-nine shares of said Class B common stock to said Rae Kingsley Blethen, Elmer E. Todd and Joseph

E. Ridder as said trustees, and with instructions to the officers of the Blethen Corporation to issue a new certificate evidencing said shares of said voting common stock to said Rae Kingsley Blethen, Elmer E. Todd and Joseph E. Ridder as said trustees;

2. For the judgment and decree of the Court in the event of a denial of the prayer of relief as set forth in paragraph 1, that said executors are holding said 39 shares of said Class B common stock in said Seattle Times Company and said shares of said voting common stock in said The Blethen Corporation in trust for said Ray Kingsley Blethen, Elmer E. Todd and Joseph E. Ridder as said trustees for the performance of said supplemental contract of December 30, 1929 as amended; and that said executors so long as they have control of said stock, vote the same as directed by said trustees; and that, in case of any difference or differences of opinion between the said trustees as to any question connected with the management of said Seattle Times Company, they submit upon request of any of said trustees said difference or [17] differences to the General Manager of the Associated Press for final decision as provided in said supplemental contract as amended.

3. For the judgment and decree of the court that said Rae Kingsley Blethen, F. D. Hammons and William K. Blethen as said executors and the said The Blethen Corporation are holding said thirty-nine shares and said 455 shares of said Class B common stock in said Seattle Times Company re-

spectively, and that said Rae Kingsley Blethen, F. D. Hammons and William K. Blethen as said executors are holding said shares of said voting common stock in said The Blethen Corporation, in trust, for the benefit of Rae Kingsley Blethen, William K. Blethen, John Alden Blethen and Francis A. Blethen as in said last will and testament provided, in so far as income from said trust created under said last will and testament is concerned, and in trust for distribution of said stock upon termination of the period of said trust as in said supplemental contract provided to William K. Blethen, John Alden Blethen, Francis A. Blethen and Clarence B. Blethen, the four living sons of said Clarence B. Blethen, deceased, or the issue of such of them as may be deceased, in equal shares, per stirpes.

4. For the judgment and decree of the court that the election of the Board of Directors of the Seattle Times Company, held on the 20th day of January, 1942, was null and void and removing from office the directors purportedly elected at said meeting.

5. For judgment against the defendants and each of them for plaintiff's costs and disbursements herein to be taxed.

6. For such other and further relief as to the court may seem just and equitable in the premises.

JONES & BRONSON,
OPPENHEIMER, HODGSON,
BROWN, DONNELLY &
BAER.

MYLES B. AMEND,

Attorneys for Plaintiff. [18]

United States of America
Western District of Washington
Northern Division—ss:

Story Birdseye, being first duly sworn upon oath deposes and says: That he is one of the attorneys for the plaintiff corporation herein and is duly authorized to make this verification on its behalf; that none of the officers of plaintiff corporation are within this jurisdiction; that he has read the above and foregoing complaint, knows the contents thereof, and believes the same to be true.

STORY BIRDSEYE

Subscribed and Sworn to before me this 10th day of November, 1942.

[Seal]

WHEELER GREY

Notary Public in and for
the State of Washington,
residing at Seattle.

[Endorsed]: Filed Nov. 10, 1943 [19]

EXHIBIT A

This Agreement, made the 30th day of December, 1929, between C. B. Blethen, party of the first part, Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag, parties of the second part, and Bernard H. Ridder, Joseph E. Ridder and Victor F. Ridder, co-partners, doing business under the firm name and style of Ridder Brothers, parties of the third part,

Exhibit A—(Continued)

Witnesseth:

That, in consideration of the mutual covenants and promises hereinafter made by the respective parties hereto, it is agreed,

First: The parties of the first and third parts will organize a corporation under the laws of the State of Delaware with the name of Seattle Times Company, and with the following corporate structure:

A. Ten thousand (10,000) shares of preferred stock having a par value of \$100.00 each, which shall be entitled to cumulative dividends at the rate of, but not exceeding, seven per centum per annum, payable quarterly out of the net earnings of the corporation. Such preferred stock shall not be entitled to any voting rights except in the case of default for six consecutive dividend payments. During any such period of default, such preferred stock shall have exclusive voting power with the right to liquidate the company, sell its assets and remove any of its existing officers or directors, and the other usual rights of preferred stockholders under the circumstances, until such time as the default shall have been remedied. Thereupon the voting powers shall again vest in the stock otherwise entitled thereto.

The certificate of incorporation shall provide that a retirement fund of Ten (10%) per cent of the total amount of any such preferred stock at any time theretofore issued shall be set up by the corporation annually for the retire- [20] ment of such preferred stock. The preferred stock shall

Exhibit A—(Continued)

be callable on any dividend date of forty-five (45) days' notice, at 105, plus cumulative unpaid dividends to the date of retirement. Such preferred stock on liquidation or dissolution shall be entitled to a preference at 105 as to assets and unpaid dividends over any other class of stock hereinafter provided for. Such retirement fund shall be paid by the corporation to the transfer agent of such preferred stock annually and shall be applied by the said transfer agent to the retirement of such preferred stock insofar as the retirement fund is available for that purpose, and shall be applied in proportion to the holdings of the preferred stockholders, or in such other manner as shall be determined by the said transfer agent, subject to the approval of the board of directors.

B. Twenty Thousand (20,000) shares of Class A common stock without par value. The Class A common stock is to have no voting rights in any event whatever, but is to be entitled to annual dividends of \$50.00 a share, after the payment of the annual dividends and retirement payments hereinabove provided for, with respect to the preferred stock, and after the payment of the interest and sinking fund payments with respect to the debentures to be issued as hereinafter set forth. The right to such annual dividends is to be non-cumulative, unless earned, provided there shall be no accumulation of dividends until the sum of Five Hundred Thousand (\$500,000.00) Dollars shall be added to the surplus, if any, existing on February 1, 1930. Upon liquidation or dissolution, the Class

Exhibit A—(Continued)

A common stock shall be entitled to share in the assets of the corporation equally, share for share, with the Class B common stock, hereinafter provided for. The Class A common stock shall be preferred as to such annual dividends of \$50.00 a share over the Class B stock, hereinafter provided for. [21]

C. One Thousand (1,000) shares of Class B common stock which shall have full voting rights, subject only to the rights of the holders of the preferred stock in the event of default in the payment of dividends on such preferred stock, as hereinabove provided for. Such Class B common stock shall not be entitled to any dividends except as the corporation shall have paid or set aside funds sufficient to meet the requirements of the interest and sinking fund obligations in respect to the debentures, as hereinafter set forth, dividends on the preferred stock and the retirement fund with respect to such preferred stock, as hereinabove set forth, and dividends on the Class A common stock, as hereinabove set forth.

D. Two Million (\$2,000,000.00) Dollars principal amount of Eighteen Year six and one-half (6½%) Debentures under an indenture of trust which shall be made by the new corporation to The First Seattle Dexter Horton National Bank of Seattle, as Trustee, in a form to be approved by the Counsel for said Bank and the Counsel for the parties of the first and third parts.

Second: The party of the first part will deliver

Exhibit A—(Continued)

to the new corporation 352.94 shares of the common stock of Seattle Times, Incorporated, a Nevada corporation, hereinafter referred to as the "Nevada corporation", and accept in exchange therefor, \$134,000.00 principal amount of the Eighteen Year 6½% Debentures of the new corporation, to be issued as hereinabove provided, 5,970 shares of the preferred stock of the new corporation, to be issued as hereinabove provided, 7,000 shares of the Class A common stock of the new corporation, to be issued as hereinabove provided, and 560 shares of its Class B stock, to issued as hereinabove provided, and \$278,300.00 in cash. [22]

Third: The parties of the second part will deliver to the new corporation 647.06 shares of the common stock of said Nevada corporation for \$3,100,990.00 in cash, to be paid to the parties of the second part by the new corporation, payable on delivery of the stock.

Fourth: Each of the parties of the second part agree to accept the following amounts of cash as their respective shares, to which each of said parties is entitled hereunder for the respective number of shares of stock in the Nevada corporation to be delivered by each of them, as follows:

	Shares	Cash
Genevieve Blethen	176.47	\$845,724.55
Rose A. Blethen.....	164.71	789,342.91
Florence B. Duffy	152.94	732,961.27
Marion B. Mesdag	162.94	732,961.27
	<hr/> 647.06	<hr/> \$3,100,990.00

Exhibit A—(Continued)

Fifth: The parties of the first and second parts represent and warrant that Seattle Times, Incorporated, has been duly organized under the laws of the State of Nevada and that it is qualified to do business in the State of Washington; that it is the owner and publisher of a daily newspaper in the City of Seattle, known as the Seattle Times; that there is no preferred stock authorized or issued and that the entire capital stock of the said Seattle Times, Incorporated, consists of one thousand shares of common stock all of which has been issued and is fully paid and non-assessable.

Sixth: The parties of the first and second parts agree that the stock of the Nevada corporation to be delivered to the new corporation, as hereinabove provided, shall be delivered to the new corporation duly endorsed for transfer or with stock powers attached, in such form as shall be approved by the parties hereto or their counsel.

Seventh: The parties of the third part agree to purchase from the new corporation 4,030 shares of the preferred [23] stock, to be issued as hereinabove provided, 13,000 shares of the Class A common stock, to be issued as hereinabove provided and 440 shares of the Class B common stock, to be issued as hereinabove provided, for \$1,662,570.00 in cash.

Eighth: The parties of the first and third parts agree that the new corporation will enter into an agreement in writing, which will provide that the new corporation will indemnify and save harmless the parties of the second part from any and all

Exhibit A—(Continued)

obligations, liabilities, costs or expenses for federal income taxes that may be levied or assessed against the said parties of the second part, or any of them, by reason of any capital gain that may accrue, to be said to have accrued, to them as a result of the sale of their said stock in the Nevada corporation to the new corporation, or by reason of any other income tax that may be assessed against the parties of the second part in any way growing out of the sale of their said stock in the Nevada corporation to the new corporation. It is understood and agreed, however, that the said parties of the second part will constitute and appoint, and hereby do constitute and appoint the new corporation, their agent or attorney in fact, to contest by appeal, suit, writ, action or otherwise the levying or assessment of any such taxes deemed by the new corporation to be excessive or contrary to law. The said parties of the second part agree to deliver to the new corporation such additional instruments, documents, affidavits, powers of attorney or other papers as may be necessary, or be deemed necessary to carry out the intention of this paragraph of this agreement.

The parties of the first and third parts hereby jointly and severally guarantee to the parties of the second part, and to each of them, the full and faithful performance of the foregoing agreement on the part of the new corporation. [24]

Tenth: The Seattle Times, Incorporated, shall, prior to February 1, 1930, exchange the stock of the Times Investment Company, a Washington

Exhibit A—(Continued)

corporation, which it now owns and holds, with said Times Investment Company for the stock of Seattle Times, Incorporated, which said Investment Company now owns and holds.

Eleventh: The parties of the first and second parts warrant and represent:

A. The Exhibit A, attached hereto, is a true and correct statement of the assets and liabilities of the Nevada corporation as of September 30, 1929, according to its books kept in the regular and usual course of business, and that such statements shall be certified by Messrs. Price, Waterhouse & Company, certified public accountants.

B. That the net difference between the assets and liabilities as set forth in said Exhibit A shall not change between the date of said Exhibit A and the date of the closing, as hereinafter provided, and that no change has occurred or will occur in the business of the Nevada corporation since the date of said Exhibit A, except such as has or may occur in the ordinary course of business and except that the said Nevada corporation has declared, prior to the date of closing, dividends on its stock to the extent of \$15,000.00 during the month of October, 1929, and to the extent of \$15,000.00 during the month of November, 1929, and to the extent of \$15,000.00 during the month of December, 1929, and except also an extra dividend during the month of December, 1929, of \$60,000.00; provided, however, that all of its accounts payable shall be paid as usual in the due course of business, and that no advances shall be made by the mortgagee in excess

Exhibit A—(Continued)

of \$275,000.00, now advanced by the Washington Mutual Savings Bank as the mortgagee of the Fairview Avenue real estate, hereinafter referred to, and provided further that the net bank [25] balance of the Nevada corporation on January 2, 1930 shall be not less than \$100,000.00. Provided, however, that in addition to the assets and liabilities set forth in Exhibit A, Seattle Times, Incorporated, on or before February 1, 1930, may and will assume and set up on its books such liability as has been incurred by and now appears on the books of the Times Investment Company, a Washington corporation, being part of the \$275,000.00, borrowed from the Washington Mutual Savings Bank, as mortgagee, which has been charged as a liability of the Times Investment Company, such liability, however, not to exceed the sum of \$141,545.25, it being understood that the Times Investment Company will re-pay to Seattle Times, Incorporated, any part of said sum which has not been expended by it in the purchase of the Fairview Avenue real estate, hereinabove referred to, and will convey said real estate to the Seattle Times, Incorporated, in consideration of its assuming such liability.

Twelfth: In addition to the assets set forth in said statement of September 30, 1929, the parties of the first and second parts agree that there will be included among the assets of the Nevada corporation at or before the closing, as hereinafter provided, two parcels of real estate situated on Fairview Avenue, in the City of Seattle, State of

Exhibit A—(Continued)

Washington, now standing in the name of the Times Investment Company, and that title thereto will be good and marketable in the said Nevada corporation on the date of closing, subject only to said mortgage of \$425,000.00, held by said Washington Mutual Savings Bank, on which 275,000.00 has been advanced.

Thirteenth: The parties of the first and second parts represent and warrant that there are no obligations or liabilities of the Nevada Corporation, whether contingent or for taxes or otherwise, which are not set forth in said Exhibit A, except such as have occurred or shall occur in the balance sheet of the Nevada corporation in the usual course of its business up to the [26] closing, as hereinafter provided, and except any liability under any reassessments for federal income taxes against said Nevada corporation for 1929 and previous years.

Fourteenth: The parties of the first and second parts agree that the Nevada corporation will not discount any accounts, notes or other receivables, whether set forth in said Exhibit A or accruing to the Nevada corporation after the date hereof and prior to the closing, as hereinafter provided, except such as shall become payable in accordance with the terms thereof and in the due course of business.

Fifteenth: The parties of the first and second part represent and warrant that the Nevada corporation has declared no dividends of any kind payable in stock, cash, property or otherwise since the date of said balance sheet herein designated

Exhibit A—(Continued)

as Exhibit A, except that cash dividends aggregating \$105,000. have been paid, and that no other dividend or distribution will be declared or paid after the date hereof, except the distribution of such shares of its own stock which it may receive in exchange from the Times Investment Company, a Washington corporation, as hereinabove provided.

Sixteenth: The party of the first part agrees, in the event that the name of the new corporation conflicts with or is in any way similar to the name of the Nevada corporation, to cause the Nevada corporation, prior to February 1, 1930, to execute such consent or consents as may be required by the Secretary of the State of Washington for the filing in the office of the Secretary of the State of Washington of the certificate of incorporation of the new corporation, or such other instrument or document as may be necessary to qualify the new corporation to do business in the State of Washington. [27]

Seventeenth: The party of the first part represents that there are no suits for libel or other suits, actions or proceedings now pending against the Nevada corporation, except two personal injury suits.

Eighteenth: The said parties of the second part agree to tender their resignation as directors of the Nevada corporation, to take effect on February 1, 1930.

Nineteenth: The parties hereto of the first and third parts have, simultaneously with the execution

Exhibit A—(Continued)

and delivery of this agreement, entered into another agreement bearing even date herewith, and hereinafter referred to as the “supplemental agreement”. The closing of this agreement is contingent upon the performance by the parties of the first and third parts of all of the terms, clauses, covenants and conditions to be performed under such supplemental agreement between them and in the event that such other agreement is not completed and/or closed, this agreement is to be deemed null and void.

Twentieth: The agreement is also contingent upon the sale of \$1,866,000.00 of the Eighteen Year 6½% Debentures, hereinbefore provided for, to the First Seattle Dexter Horton Securities Company and its underwriting associates on or before February 1, 1930, and in the event such sale is not consummated, this agreement is to be deemed null and void.

Twenty-First: In the event that the statements contained in Exhibit A hereto annexed have not been certified by Messrs. Price, Waterhouse & Company, or in the event that the net difference between the assets and liabilities set forth in Exhibit A changes prior to the closing hereunder (except changes as are hereby specifically permitted), or, in the event that any of the representations of the parties of the first and second parts are found to be false, or warranties of said parties are unfulfilled, the party [28] of the third part shall have the option to cancel this contract.

Twenty-Second: The parties of the first and

Exhibit A—(Continued)

third parts agree with the parties of the second part that that certain mortgage of \$425,000.00, held by the Washington Mutual Savings Bank, on which \$275,000.00 has been advanced, which mortgage covers the Times Building, owned by the Times Investment Company and other property, will be satisfied of record before the closing of this contract and that the Times Building and the real estate upon which situated will be released from the lien of said mortgage.

Twenty-Third: The closing of this contract shall take place of 10 o'clock in the forenoon on February 1, 1930, at the office of The First Seattle Dexter Horton National Bank of Seattle, or at such place in said City of Seattle as may be designated by the attorneys for the party of the first part.

Twenty-Fourth: The parties of the third part may assign this contract and all their right, title and interest thereunder and/or any securities to be issued thereunder, to a corporation organized or to be organized by them, in which they own over 60% of all of the issued capital stock.

Exhibit A—(Continued)

In Witness Whereof, the parties hereto have caused this instrument to be executed on the day and year first above written.

(signed) C. B. BLETHEN
 " GENEVIEVE S. BLETHEN
 " ROSE A. BLETHEN
 " FLORENCE B. DUFFY
 " MARION B. MESDAG
 " RIDDER BROS.

By: BERNARD H. RIDDER

Co-Partners doing business
 under the firm name and
 style of Ridder Brothers.

[29]

EXHIBIT "A"

SEATTLE TIMES, INCORPORATED

ASSETS

September 30, 1929

CAPITAL ASSETS:

Associated Press Franchise		\$ 50,000.00	
Machinery and equipment, including office furniture and fixtures	\$ 1,152,948.53		
Less—Reserve for Depreciation	452,072.50	700,876.03	\$750,876.03

INVESTMENTS:

75 Shares The Times Investment Co.	66,666.67	
Miscellaneous	1,030.00	67,696.67

Exhibit A—(Continued)

CURRENT ASSETS:

Inventories — At cost or market, whichever low- er		\$100,929.60	
Accounts Receivable— Advertis- ing \$342,953.36			
Circula- tion 58,746.84			
Sundry 3,843.12	\$405,543.32		
<hr/>			
Notes Receivable	4,418.83		
<hr/>			
	409,962.15		
Less—Reserve for Bad Debts	26,200.00	383,762.15	
Cash in banks and on hand		52,199.90	\$536,901.65
<hr/>			

DEFERRED CHARGES:

Insurance Premiums unexpired.....	\$ 10,860.24		
Miscellaneous prepaid Expenses.....	3,481.46		
Remodeling Commercial Division.....	4,685.72	19,027.42	
<hr/>			
		\$1,374,501.77	
		[30]	

EXHIBIT "A"

SEATTLE TIMES, INCORPORATED

September 30, 1929

LIABILITIES

CAPITAL STOCK:

Authorized Issue—1,000 shares of \$100. each.....	\$100,000.00
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DEFERRED LIABILITIES:

Notable payable (Payable at rate of \$3,333.33 annually beginning 3/10/30	\$ 39,999.96	
Mortgages Payable	133,454.75	\$173,454.71
<hr/>		
Provisions for Income Tax Year 1929		36,923.24

Exhibit A—(Continued)

CURRENT LIABILITIES:

Accounts Payable	\$192,997.97	
Interest accrued	845.08	\$193,842.05
<hr/>		
Income Tax for 1928 due		
Dec. 15, 1929		15,056.50
Property Taxes accrued		
for 1929	19,600.00	\$228,498.55
<hr/>		

UNEARNED REVENUES:

Subscriptions, etc, received		
in advance		\$ 14,372.37

SURPLUS:

Balance at January 1,		
1929	\$792,216.18	
Less Additional Assess-		
ment Income Tax Prior		
Year	233.71	\$791,982.47
<hr/>		
Operating Profit January		
1, 1929 to September 30,		
1929	\$307,693.67	
Dividends received from		
The Times Investment		
Company	\$ 15,000.00	
<hr/>		
	\$322,693.67	
Less — Provision for In-		
come Tax, 1929.....	36,923.24	\$285,770.43
<hr/>		
	\$1,077,752.90	
Less Dividends paid in		
1929	256,500.00	\$821,252.90
<hr/>		
		\$1,374,501.77

EXHIBIT "B"

It Is Agreed that the Eighth paragraph of the Agreement made the 30th day of December, 1929, between C. B. Blethen, party of the first part, Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag, parties of the second part, and Bernard H. Ridder, Joseph E. Ridder and Victor F. Ridder, copartners doing business under the firm name and style of "Ridder Brothers", parties of the third part, be Amended and Modified to read as follows:

"Eighth: The parties of the first and third parts hereby expressly agree to indemnify and save harmless the parties of the second part from any and all obligations, liabilities, costs or expenses for federal income taxes that may be levied or assessed against the said parties of the second part, or any of them, by reason of any capital gain that may accrue, or be said to have accrued, to them as a result of the sale of their said stock in the Nevada corporation to the new corporation, or by reason of any other income tax that may be assessed against the parties of the second part in any way growing out of the sale of their stock in the Nevada corporation to the new corporation. It is understood and agreed, however, that the said parties of the second part will constitute and appoint and hereby do constitute and appoint the parties of the first and third parts, their agents or attorneys-in-fact, to contest by appeal, suit, writ, action or otherwise the levying or assessment of any such taxes deemed by the parties of the first and third parts to

be excessive or contrary to law. The said parties of the second part agree to deliver to the parties of the first and third parts such additional instruments, documents, affidavits, powers of attorney or other papers as may be necessary, or be deemed necessary, to carry out the intention of this paragraph of this agreement."

Dated this 4th day of January.

C. B. BLETHEN

Party of the first part.

GENEVIEVE S. BLETHEN

ROSE A. BLETHEN

FLORENCE BLETHEN DUFFY

MARION BLETHEN MESDAG

Parties of the Second Part.

RIDDER BROTHERS

By BERNARD RIDDER

Parties of the Third Part.

[32]

EXHIBIT "C"

This Agreement, made the 1st day of February, 1930, between C. B. Blethen, party of the first part, Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag, parties of the second part, and Bernard H. Ridder, Joseph E. Ridder and Victor F. Ridder, co-partners, doing business under the firm name and style of Ridder Brothers, parties of the third part,

Witnesseth:

Whereas, the parties hereto entered into an agreement dated December 30, 1929 (as modified by an agreement dated January 4, 1930) providing, among other things, for the organization of a Delaware corporation for the purpose, among others, of acquiring all of the capital stock of Seattle Times, Incorporated, a Nevada corporation; and

Whereas, such corporation has been organized under the laws of the State of Delaware and the parties hereto desire to further modify, in certain respects, said agreement of December 30, 1939 (as so modified by said agreement dated January 4, 1930);

Now, Therefore, in consideration of the foregoing and in consideration of the mutual covenants and promises hereinafter made by the respective parties hereto, It Is Agreed;

(1) Paragraph Second of said agreement of December 30, 1929 is hereby modified and amended to read as follows:

“Second: The party of the first part will deliver to the new corporation 352.94 shares of the common stock of Seattle Times, Incorporated, a Nevada corporation, hereinafter referred to as the “Nevada corporation”, and accept in exchange therefor 7,310 shares of the preferred stock of the new corporation, to be issued as hereinabove provided, 7,000 shares of the Class A common stock of the new corporation, to be issued as hereinabove provided, and 560 shares of its Class B stock, to be issued as hereinabove provided, and \$280,980.00 in cash.”

(2) Paragraph Seventh of said agreement of December 30, 1929 is hereby modified and amended to read as follows: [33]

“Seventh: The parties of the third part agree to purchase from the new corporation 2,690 shares of the preferred stock, to be issued as hereinabove provided, 13,000 shares of the Class A Common Stock, to be issued as hereinabove provided, and 440 shares of the Class B Common Stock, to be issued as hereinabove provided, for \$1,541,970.00 in cash.”

(3) Paragraph Eighth of said agreement of December 30, 1929 is hereby modified and amended to read as follows:

“Eighth: The parties of the first and third parts hereby expressly agree to indemnify and save harmless the parties of the second part from any and all obligation, liabilities, costs or expenses for federal income taxes that may be levied or assessed against the said parties of the second part, or any of them, by reason of any capital gain that may accrue to them as a result of the sale of their said stock in the Nevada corporation to the new corporation, or by reason of any other income tax that may be assessed against the parties of the second part in any way growing out of the sale of their stock in the Nevada corporation to the new corporation. The parties of the second part, and each of them, agree not to sign or file their respective Federal income tax returns covering the year 1930 or any affidavit, schedule or other document relating thereto, or take any action whatsoever in connection therewith without first submitting the same to the parties of the

first and third parts and obtaining the written approval of the parties of the first and third parts and their counsel. In case the parties of the second part shall be notified in writing that any additional tax of the character above described has been levied, assessed or asserted against the parties of the second part, or any of them, the party or parties of the second part affected by such notice shall within fifteen (15) days from the date of receipt of such notice by such party or parties, deliver the same, or a copy thereof to the party of the first part, or his legal representatives, in case of his death. Such notice shall be deemed delivered when placed in United States mail postage prepaid and registered, addressed to the party of the first part at his place of business, or the place of business of his legal representative in case of his death. The parties of the second part further agree not to pay any Federal income tax which may be levied, assessed or asserted against them, or any of them, for the year 1930 without first obtaining the consent of the parties of the first and third parts and their counsel. It is further understood and agreed that the said parties of the second part will constitute and appoint and hereby do constitute and appoint the parties of the first and third parts their agents or attorneys-in-fact to contest by appeal, suit, writ, action or otherwise the levying or assessment of any such taxes deemed by the parties of the first and third parts to be excessive or contrary to law. The said parties of the [34] second part, and each of them, agree to deliver to the parties of the first and

third parts such information, instruments, documents, affidavits or other papers, as well as to provide such access to the books, records, or other documents of each of them relating to their respective income tax returns, as may be necessary or be deemed necessary by the parties of the first and third parts to carry out the intention of this paragraph.

(4) The last sentence of paragraph Eleventh of said agreement of December 30, 1929, is hereby modified and amended to read as follows:

“Provided, however, that in addition to the assets and liabilities set forth in Exhibit A, Seattle Times, Incorporated, on or before February 3, 1930, may and will assume and set up on its books such liability as has been incurred by and now appears on the books of the Times Investment Company, a Washington corporation, being part of the \$275,000.00, borrowed from the Washington Mutual Savings Bank, as mortgagee, which has been charged as a liability of the Times Investment Company, such liability, however, not to exceed the sum of \$141,545.25, it being understood that the Times Investment Company will re-pay to Seattle Times, Incorporated, any part of said sum which has not been expended by it in the purchase of the Fairview Avenue real estate, hereinabove referred to, and will convey said real estate to the Seattle Times, Incorporated, in consideration of its assuming such liability.”

(5) Paragraph Twelfth of said agreement of De-

ember 30, 1929, is hereby modified and amended to read as follows:

“Twelfth: In addition to the assets set forth in said statement of September 30, 1929, the party of the first part agrees that there will be included among the assets of the Nevada corporation at or before the closing, as hereinafter provided, two parcels of real estate situated on Fairview Avenue, in the City of Seattle, State of Washington; now standing in the name of the Times Investment Company, and that title thereto will be good and marketable in the said Nevada Corporation on or before the date of closing, subject only to said mortgage of \$425,000.00, held by said Washington Mutual Savings Bank, on which \$275,000.00 has been advanced (and which will be satisfied of record on or before the closing of this contract, as hereinafter provided.)”

(6) Paragraph Seventeenth of said agreement of December 30, 1929, is hereby modified and amended to read as follows:

“Seventeenth: The party of the first part represents that there are no suits for libel or other suits, actions or proceedings now pending against [35] the Nevada corporation, except two personal injury suits, in one of which judgment has been rendered against the Nevada corporation for \$2500.00, in which execution has been stayed pending appeal, and in the other of which damages are claimed in the sum of \$29,500.00, in respect to each of which suits said Nevada corporation is protected by liability insurance to the extent of \$10,000.”

(7) Paragraph Eighteenth of said agreement of December 30, 1929, is hereby modified and amended to read as follows:

“Eighteenth: The said parties of the second part agree to tender their resignations as directors of the Nevada corporation, to take effect on or before February 3, 1930.”

(8) Paragraph Twentieth of said agreement of December 30, 1929, is hereby modified and amended to read as follows:

“Twentieth: The agreement is also contingent upon the sale of \$2,000.00 of the 6½% Eighteen Year Debentures, hereinbefore provided for, to the First Seattle Dexter Horton Securities Company and its underwriting associates on or before February 3, 1930, and in the event such sale is not consummated, this agreement is to be deemed null and void.”

(9) Paragraph Twenty-Second of said agreement of December 30, 1929, is hereby modified and amended to read as follows:

“Twenty-Second: The party of the first part, at or before the closing, will pay to the Nevada corporation the sum of \$269,000. (being the amount due from *part* of the first part, as trustee under an Employee's Stock Purchase Agreement), and the sum of \$9,537,000. (being the cash surrender value of Policies of life insurance on the life of the party of the first part), and the Nevada corporation will deliver to the party of the first part the said life insurance policies and consent insofar as may be necessary to the naming of such beneficiary in such

life insurance policies as may be nominated by the said party of the first part. The parties of the first and third parts further agree with the parties of the second part that that certain mortgage of \$425,000.00 held by the Washington Mutual Savings Bank, on which \$275,000. has been advanced, which mortgage covers the Times Building owned by the Times Investment Company and other property, will be satisfied of record at or before the closing of this contract.”

(10) Paragraph Twenty-Third of said agreement of December 30, 1929, is hereby modified and amended to read as follows:

“Twenty-Third: The closing of this contract shall take place on February 3, 1930 at the office of The First Seattle Dexter Horton National Bank of Seattle or at such place in said City of Seattle as may be [36] designated by the attorneys for the party of the first part.”

(11) That the party of the first part may consummate with the new corporation the transaction provided for in Paragraph Second of said agreement of December 30, 1929, as amended, prior to any transaction between the new corporation and either parties of the second part or parties of the third part.

(12) Except as herein expressly modified, the agreement between the parties dated December 30, 1929, (as modified by said agreement dated January 4, 1930) shall remain in full force and effect.

In Witness Whereof, the parties hereto have caused this instrument to be executed on the day and year first above written.

C. B. BLETHEN

GENEVIEVE S. BLETHEN

ROSE A. BLETHEN

FLORENCE B. DUFFY

MARION B. MESDAG

RIDDER BROTHERS

Ridder Bros.

By BERNARD H. RIDDER

Co-partners doing business under the firm name and style of Ridder Brothers [37]

EXHIBIT D

Supplemental Agreement

This Agreement, made the 30th day of December, 1929, between C. B. Blethen, hereinafter referred to as "Blethen", and Bernard H. Ridder, Joseph E. Ridder and Victor F. Ridder, co-Partners, doing business under the firm name and style of Ridder Brothers, hereinafter referred to as "Ridder Brothers".

Whereas, the parties hereto, together with Genevieve Blethen, Ross A. Blethen, Florence B. Duffy, and Marion B. Mesdag, have entered into an agreement bearing even date herewith and intended to be executed and delivered simultaneously herewith

and which this agreement is intended to supplement, and

Whereas, said agreement provides, among other things, for the organization of a Delaware corporation which is to acquire all of the stock or all of the assets of Seattle Times, Incorporated, a Nevada corporation, and

Whereas, all the voting or Class B common stock of such new Delaware corporation, as provided in said agreement, will be owned by the parties hereto in the following proportions, namely:

Blethen	56%
Ridder Brothers	44%

Whereas, it is intended by the parties hereto that Blethen should undertake the general management of said New corporation, and more particularly of the newspaper to be published by it or by its subsidiary, and assume the position of President of said new corporation, and give his entire time and attention to the management of the business and affairs of said corporation and/or its subsidiary, and

Whereas, the parties hereto each desire that their respective holdings of the voting stock of the new Delaware corporation remain as now held for the period or periods hereinafter specified; [38]

Now, Therefore, in consideration of the foregoing and in consideration of the mutual agreements hereinafter contained, the parties hereto mutually covenant and agree:

First: The certificate of incorporation or the by-laws, whichever may be appropriate, of the new Delaware corporation shall provide for nine directors of such corporation.

Second: The certificate of incorporation of such new corporation shall provide for cumulative voting so that each stockholder will be entitled to as many votes at each election of directors as shall equal the number of shares of stock held by such stockholder, multiplied by the number of directors to be elected, and any such stockholder may cast all of such votes for any one director or for two or more of such directors.

Third: Blethen shall receive the sum of \$114,000. per annum for his salary as an officer and/or general manager of the new corporation and/or its subsidiaries during his incumbency of office, and no more.

Fourth: Ridder Brothers shall receive \$25,000. in salary for performing such duties as officers of the new corporation and/or of its subsidiaries or otherwise as may be delegated to them by the board of directors.

Fifth: Blethen shall not, for a period of twenty-one years from the date hereof, sell, assign, transfer, pledge or hypothecate any of the Class B common stock of such new Delaware corporation owned by him so as to reduce his holdings of such Class B common stock to less than 51% of such Class B common stock at any time issued or outstanding.

Sixth: Ridder Brothers shall not, during the same period of twenty-one years, sell, assign, trans-

fer, pledge or hypothecate any of their Class C common stock of such new Delaware corporation, except that nothing herein contained [39] shall be deemed to prevent or prohibit the sale or transfer of any of such Class B common stock by Ridder Brothers to any corporation in which said Ridder Brothers own over 60% of all of the voting stock.

Seventh: The certificates of stock representing the shares of the Class B common stock in the new corporation, to be issued to the parties to this agreement, shall bear an endorsement to the effect that such certificates and the stock represented thereby are subject in all respects to the terms, clauses and conditions of this agreement. All certificates of stock representing any of said Class B common stock issued in lieu of said original certificates, or issued as a stock dividend on said original stock, or issued on any split-up of said original stock, or issued on account of any increase of said original stock, shall bear a similar endorsement.

Eighth: Blethen agrees, immediately after the issuance of Class B common stock to him to make a last Will and Testament, or some other instrument in writing, which will provide in effect that his Class B common stock be held in trust by his trustees after his death for a period of twenty-one years after the date hereof. Such last Will and Testament or other trust instrument shall also provide that Blethen's Class B common stock shall not be sold by his trustees until the termination of such trust. Such last Will and testament or other trust instrument shall constitute, nominate and appoint

the widow of said Blethen as one of the trustees, Bernard R. Ridder, another of such trustees, and Elmer E. Todd, the third of such trustees. It shall further provide that, in the event of the death, resignation or disability of his widow at any time, the vacancy caused thereby shall not be filled but the surviving trustees [40] shall act. In the event of the death, resignation or disability of Bernard H. Ridder at any time, one of his brothers shall act as trustee in his place and stead and, in the event of the death, resignation or disability of Elmer E. Todd at any time, one of the partners of the law firm now representing Blethen shall act as trustee in his place and stead. Such last Will and Testament or other trust instrument shall also provide that upon the termination of the trust, Blethen's Class B common stock shall be distributed by the trustees among the surviving sons of said Blethen and the issue of such of them as may be deceased, in equal shares, per Stirpes. Such last Will and Testament, or other trust instrument, shall further provide that, in case of any difference or differences of opinion between the said trustees as to any question connected with the management of the corporation, the Class B common stock of which is to constitute the corpus of the trust, any trustee may submit such a question for arbitration, upon notice to the other trustees, to the then general manager of The Associated Press, and in any such case the decision of the said then general manager of The Associated Press shall be final and conclusive and be binding upon all of said trustees.

Ninth: In the event that Blethen should, at any time before the expiration of twenty-one years from the date hereof, be adjudicated incompetent to manage his affairs or estate, it is desired, and he hereby recommends that any Court which has jurisdiction over the appointment of a guardian, committee or conservator of his estate, appoint as such guardians, committee or conservators, as the case may be, the persons hereinabove specified to be the trustee under such last Will and Testament or other trust instrument to be made by him. Blethen directs and [41] requests any guardians, committee or conservators that may be appointed for his estate that any difference of opinion that may arise between them with respect to the management of the corporation, the Class B common stock of which forms a part of his estate, be submitted for arbitration to the then general manager of The Associated Press and that such guardians, committee or conservators accept the decision of such then general manager of The Associated Press as final and conclusive.

Tenth: The parties hereto agree to cause the new Delaware corporation to be organized, as hereinabove specified, to enter into an agreement in writing which will provide that such new corporation will indemnify Blethen and save him harmless from any and all obligations, liabilities, costs or expenses for federal income taxes that may be levied or assessed against Blethen by reason of any capital gain that may accrue or be said to have accrued to him as a result of his exchange of its stock in Seattle Times, Inc., a Nevada corporation for debent-

tures, stock or cash of the new corporation. It is understood and agreed, however, that Blethen will constitute and appoint and hereby does constitute and appoint the new corporation his agent or attorney in fact to contest by appeal, suit, writ, action or otherwise, the levying or assessment of any such tax deemed by the new corporation to be excessive or contrary to law and Blethen agrees to deliver to the new corporation such additional instruments, documents, affidavits, powers of attorney or other papers that may be necessary or be deemed necessary to carry out the intention of this paragraph of this agreement.

Eleventh: The agreement bearing even date herewith between the parties hereto and Genevieve Blethen and others, which agreement this agreement is entitled to supplement, provides among other things that the new Delaware corporation shall [42] enter into an agreement in writing which will provide that said new Delaware Corporation will indemnify and save harmless Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag from any and all obligations, liabilities, costs or expenses for federal income taxes that may be levied or assessed against the said Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag or any of them by reason of any capital gain that may accrue or may be said to have accrued to them as a result of their exchange of their stock of Seattle Times, Incorporated, for debentures and cash of said new Delaware corporation, the full and faithful performance of which agree-

ment is jointly and severally guaranteed by Blethen and Ridder Brothers. It is hereby expressly understood and agreed that as between Blethen and Ridder Brothers, said guarantee is the primary obligation of the Ridder Brothers and that they agree to indemnify and save harmless the said Blethen against any loss or liability resulting to him on account of his said guarantee to said other stockholders of Seattle Times, Incorporated.

It is hereby expressly understood and agreed that the said new Delaware corporation will pay to Blethen an amount which shall equal seven-thirteenths (7/13) of any amount of money which said new Delaware corporation is obligated to pay on account of any federal income tax levied or assessed against said Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag at such time or times as such payments are made by said new corporation on account of said federal income tax. In the event that such payment or payments are not made by the new Delaware corporation to Blethen, as hereinabove provided, Ridder Brothers agree that they personally will pay to Blethen Thirty-five (35%) per cent of any sum or sums which are paid by the new Delaware corporation on account of any federal income [43] tax levied or assessed against said Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag, as provided in said agreement hereinabove referred to.

It is hereby expressly understood and agreed that

if the new corporation fails or refuses to contest the levying of assessment of any of the above mentioned federal income taxes that may be levied or assessed against the said Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag, or any of them, then the said Ridder Brothers shall have the right so to contest the levying or assessment of said taxes and all of the powers given to the new corporation in the Eighth Paragraph of the original agreement between the parties hereto and Genevieve Blethen and others are and shall be given to the said Ridder Brothers, their agents or attorneys in fact, and the new corporation will execute all such instruments and documents as may be necessary to vest said powers in said Ridder Brothers, their agents or attorneys in fact.

Thirteenth: It is hereby expressly understood and agreed by the parties hereto that none of them will become directly or indirectly interested in any other newspaper in the State of Washington except by mutual consent.

Fourteenth: This agreement shall not become effective unless the agreement bearing even date herewith, and to which this agreement is intended to be supplemental, is closed or completed on February 1, 1930, and in the event that such other agreement is not closed or completed on said date, this agreement shall be deemed by the parties hereto to be null and void.

Fifteenth: Ridder Brothers may assign this contract and all their right, title and interest there-

under to a [44] corporation organized or to be organized by them in which they own over sixty per cent of all of the issued capital stock.

(Signed) C. B. BLETHEN.

“ RIDDER BROTHERS,

“ By BERNARD H. RIDDER,

Co-partners doing business under the firm name and style of Ridder Brothers. [45]

EXHIBIT “E”

This agreement, made this 15th day of January, 1930, between C. B. Blethen, hereinafter referred to as “Blethen” and Bernard H. Ridder, Joseph E. Ridder and Victor F. Ridder, co-partners doing business under the firm name and style of Ridder Brothers, hereinafter referred to as “Ridder Brothers”.

Whereas, the said Blethen, as party of the first part and Ridder Brothers, as parties of the third part, on the 30th day of December, 1929, entered into an agreement with Genevieve Blethen, Rose A. Bethen, Forence B. Duffy and Marion B. Mesdag, as parties of the second part, which agreement is hereinafter referred to as the “Main Agreement”, and

Whereas, on said 30th day of December, 1929, the said Blethen and the said Ridder Brothers entered into an agreement supplemental to said Main Agreement, which agreement of December 30, 1929

between Blethen and Ridder Brothers is herein-after referred to as the "Supplemental Agreement", and

Whereas, on January 4, 1930, all of the parties to the Main Agreement entered into an agreement modifying the eighth paragraph of the Main Agreement, which agreement of January 4, 1930 is hereinafter referred to as the "Modifying Agreement", and

Whereas, it is the intention of the said Blethen and the said Ridder Brothers that the Ridder Brothers are ultimately liable for all Federal income taxes that may be assessed or levied against Genevieve Belthen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag and each of them by reason of any capital gain or other income taxes that may be assessed against them resulting from the sale or their stock in Seattle Times, Incorporated, a Nevada Corporation, to Seattle Times Company, a Delaware Corporation, and that Seattle Times Company is liable [46] for any income taxes that may be assessed or levied against C. B. Blethen on account of the sale of his stock in Seattle Times, Incorporated, a Nevada Corporation, to Seattle Times Company, a Delaware Corporation, and that in case the Delaware Corporation for any reason does not pay such taxes assessed or levied against C. B. Blethen, he will bear thirty-five per cent of such taxes and the Ridder Brothers sixty-five per cent of them,

Now, therefore, it is expressly understood and agreed that the tenth and eleventh paragraphs of

the supplemental agreement be respectively amended and modified to read as follows:

Tenth: The parties hereto agree to cause the new Delaware Corporation to be organized, as hereinabove specified, to enter into an agreement in writing which will provide that such new corporation will indemnify Blethen and save him harmless from any and all obligations, liabilities, costs or expenses for Federal income taxes that may be levied or assessed against Blethen by reason of any capital gain that may accrue or be said to have accrued to him as a result of his exchange of his stock in Seattle Times, Incorporated, a Nevada Corporation, for debentures, stock or cash of the new corporation. It is understood and agreed, however, that Blethen will constitute and appoint and hereby does constitute and appoint the new corporation his agent or attorney in fact to contest by appeal, suit, writ, action or otherwise, the levying or assessment of any such tax deemed by the new corporation to be excessive or contrary to law and Blethen agrees to deliver to the new corporation such additional instruments, documents, affidavits, powers of attorney or other papers that may be necessary to be deemed necessary to carry out the intention of this paragraph of this agreement. [47]

It is expressly understood and agreed that if the new Delaware Corporation for any reason fails to pay such Federal income taxes that may be levied or assessed against the said Blethen, or fails to indemnify him or save him harmless therefrom, then

he shall bear 35% of such taxes and Ridder Brothers 65% of such taxes and the Ridder Brothers expressly agree that in case said new Delaware Corporation fails to pay said taxes or to indemnify and save harmless the said Blethen from the payment thereof, then the said Ridder Brothers will pay 65% of said taxes and indemnify and save the said Blethen harmless from the payment thereof.

Eleventh: The Main Agreement, dated December 30, 1929 between the parties hereto and Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag, as modified by the modifying agreement, dated January 4, 1930, provides that Blethen and the Ridder Brothers expressly agree to indemnify and save harmless Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag from any and all liabilities, obligations, costs or expenses for Federal income taxes that may be levied or assessed against the said Genevieve Blethen, Rose A. Blethen, Florence B. Duffy and Marion B. Mesdag, or any of them, by reason of any capital gain that may accrue or be said to have accrued to them as a result of the sale of their said stock in the Nevada Corporation to the new Delaware corporation or by reason of any other income taxes that may be assessed against the parties of the second part in any way growing out of the sale of their stock in the Nevada corporation to the new corporation. It is hereby expressly understood and agreed that, as between Blethen and Ridder Brothers, the above agreement to indemnify and save harmless the said Genevieve Blethen, Rose A.

Blethen, Florence B. Duffy and Marion B. Mesdag [48] and each of them from such taxes is the primary obligation of the said Ridder Brothers and that the said Ridder Brothers shall be ultimately liable for the payment of such taxes and the Ridder Brothers agree to indemnify and save harmless the said Blethen against any loss or liability resulting to him on account of his said agreement to indemnify and save harmless the other stockholders of Seattle Times, Incorporated, from the payment of such taxes.

C. B. BLETHEN,
RIDDER BROTHERS,
By: BERNARD H. RIDDER,
Co-partners doing business
under the firm name and
style of Ridder Brothers.
[49]

EXHIBIT "F"

This Agreement, made the 1st day of February, 1930, between C. B. Blethen (hereinafter referred to as "Blethen") and Bernard H. Ridder, Joseph E. Ridder and Victor F. Ridder, copartners, doing business under the firm name and style of Ridder Brothers (hereinafter referred to as "Ridder Brothers"),

Witnesseth:

Whereas, the parties hereto entered into an agreement dated December 30, 1929 (as modified by an

agreement dated January 15, 1930), containing various provisions with respect to the Class B common stock of Seattle Times Company, a Delaware Corporation, organized by the parties hereto pursuant to said agreement of December 30, 1929; and

Whereas, the parties hereto desire to further modify in certain respects said agreement of December 30, 1929 (as so modified by said agreement dated January 15, 1930);

Now, Therefore, in consideration of the foregoing and in consideration of the mutual covenants and promises hereinafter made by the respective parties hereto, It Is Agreed:

(1) Paragraph Third of said agreement of December 30, 1929 is hereby modified and amended to read as follows:

“Third: Blethen shall enter into a contract of employment with Seattle Times Company, a Delaware corporation, whereby Blethen shall agree to act as President of said Seattle Times Company and as publisher of its newspaper known as “The Seattle Times” for a period of five (5) years, and shall receive for his services as such President and Publisher an annual salary of One Hundred Fourteen Thousand (\$114,000.), and no more. Such employment contract shall also contain a provision that Blethen shall not engage or become interested, directly or indirectly, in any other newspaper, advertising or general publishing business in the State of Washington, except with the consent of Ridder Brothers”.

(2) Paragraph Fourth of said agreement of December 30, 1929 is hereby modified and amended to read as follows: [50]

“Fourth: Ridder Brothers, Incorporated, a New Jersey corporation, the majority of the capital stock of which is owned by said Ridder Brothers, shall enter into a management contract with Seattle Times Company, a Delaware Corporation, whereby said Ridder Brothers, Incorporated, through its officers, agents and employees, will furnish to Seattle Times Company, for a period of five (5) years, such services and management in the conduct of the business of said Seattle Times Company as may be required of it by the Board of Directors of said Seattle Times Company, and the said Ridder Brothers, Incorporated, shall receive annually therefor, as management compensation, the sum of Twenty-five Thousand Dollars (\$25,000.) and no more. Such management contract shall also contain a provision that said Ridder Brothers shall not engage or become interested, directly or indirectly, in any other newspaper, advertising or general publishing business in the State of Washington, except with the consent of Blethen.”

(3) Paragraph Tenth of said agreement of December 30, 1929 is hereby modified and amended to read as follows:

“Tenth: The parties hereto agree to cause Seattle Times Company, the Delaware corporation, to enter into an agreement in writing which will provide that such corporation will indemnify Blethen and save him harmless from any and all obligations,

liabilities, costs or expenses for Federal income taxes that may be levied, or assessed, against Blethen by reason of any capital gain that may accrue at any time as a result of his exchange of his stock in Seattle Times, Incorporated, a Nevada corporation, for stock of Seattle Times Company and cash. It is understood and agreed, however, that said Seattle Times Company shall not be liable to Blethen for the payment of any taxes on any gain that may be realized by Blethen upon the sale by him of any securities received on such exchange. Such agreement shall provide that Blethen shall not sign or file his Federal income tax return covering the year 1930 or any affidavit, schedule or other document relating thereto, or take any action whatsoever in connection therewith, or pay any such tax that may be levied or assessed or asserted against him, without first submitting the same to the Company and obtaining the written approval of the Company and its counsel. It is understood and agreed, however, that Blethen will constitute and appoint, and hereby does constitute and appoint, Seattle Times Company his agent or attorney-in-fact to contest by appeal, suit, writ, action or otherwise, the levying or assessment of any such tax deemed by Seattle Times Company to be excessive or contrary to law and Blethen agrees to deliver to said Seattle Times Company such information, instruments, documents, affidavits, powers of attorney or other papers as well as to provide such access to his books, records or other documents relating to his income tax return, as may be necessary

or be deemed necessary to carry out the intention of this paragraph. It is further expressly understood and agreed that if the Delaware Corporation for any reason fails to [51] pay such Federal income taxes that may be levied or assessed against the said Blethen, or fails to indemnify him or save him harmless therefrom, then Blethen shall bear thirty-five per cent (35%) of such taxes and Ridder Brothers sixty-five per cent (65%) of such taxes, and the Ridder Brothers expressly agree that in case said Delaware corporation fails to pay said taxes or to indemnify and save harmless the said Blethen from the payment thereof, then the said Ridder Brothers will pay sixty-five per cent (65%) of said taxes and indemnify and save the said Blethen harmless from the payment of said sixty-five per cent (65%) of said taxes."

(4) Said agreement of December 30, 1929 is further modified so as to strike out and eliminate therefrom entirely paragraph Thirteenth thereof.

(5) Paragraph Fourteenth of said agreement of December 30, 1929 is hereby modified and amended to read as follows:

"Fourteenth: This agreement shall not become effective unless the agreement bearing even date herewith and to which this agreement is intended to be supplemental, is closed or completed on February 3, 1930, and in the event that such other agreement is not closed or completed on said date, this agreement shall be deemed by the parties hereto to be null and void."

(6) Except as herein expressly modified the agreement between the parties dated December 30, 1929 (as modified by said agreement dated January 15, 1930) shall remain in full force and effect.

In Witness Whereof, the parties hereto have caused this instrument to be executed on the day and year first above written.

C. B. BLETHEN,
RIDDER BROTHERS,
By JOSEPH E. RIDDER,
Co-partners doing business
under the firm name and
style of Ridder Brothers.
[52]

EXHIBIT G

This Agreement, made this 30th day of June, 1930, between C. B. Blethen (hereinafter referred to as "Blethen") and Bernard H. Ridder, Joseph E. Ridder and Victor F. Ridder, copartners doing business under the firm name and style of "Ridder Brothers", (hereinafter referred to as "Ridder brothers")

Witnesseth:

Whereas, the parties hereto entered into an agreement dated December 30, 1929 (as modified by an agreement dated January 15, 1930 and as subsequently further modified by an agreement dated February 1, 1930) containing various provisions with respect to the Class B common stock of Seattle Times Company, a Delaware corporation, or-

ganized by the parties hereto pursuant to said agreement of December 30, 1929; and

Whereas, said parties hereto desire further to modify said agreement so as to permit the said Blethen to transfer his stock to a holding corporation of which he will at all times own over sixty (60) per cent of all of the voting stock;

Now, Therefore, in consideration of the foregoing and in consideration of the mutual covenants and promises hereinafter made by the respective parties hereto, It Is Agreed:

(1) Paragraph Fifth of said agreement of December 30, 1929 is hereby modified and amended to read as follows:

“Fifth: Blethen shall not, for a period of twenty-one years from December 30, 1929, sell, assign, transfer, pledge or hypothecate any of the Class B common stock of such Delaware corporation owned by him so as to reduce his holdings of such Class B common stock to less than fifty-one (51) per cent of such Class B common stock at any time issued or outstanding, except that nothing herein contained shall be deemed to prevent or prohibit Blethen from transferring not less than fifty-one (51) per cent of such Class B common stock at any time issued or outstanding to a holding corporation to be formed by him, in which holding corporation he shall at all times own not less than sixty (60) per cent of the voting stock, provided such holding corporation shall not, for a period of twenty-one (21) years from December 30, 1929, sell, assign, transfer, pledge or hypothecate any of such Class

B common stock of Seattle Times Company, a Delaware corporation.” [53]

(2) Paragraph Eighth of said agreement of December 30, 1929 is hereby modified and amended to read as follows:

“Eighth: Blethen agrees, immediately after the issuance of Class B common stock to him, to make a last Will and Testament, or some other instrument in writing, which will provide in effect that his Class B common stock be held in trust by his trustees after his death for a period of twenty-one (21) years from December 30, 1929. Such last Will and Testament or other trust instrument shall also provide that Blethen’s Class B common stock shall not be sold by his trustees until the termination of such trust. Such last Will and Testament or other trust instrument shall constitute, nominate and appoint the widow of said Blethen as one of the trustees, Bernard H. Ridder, another of such trustees, and Elmer E. Todd, the third of such trustees. It shall further provide that, in the event of the death, resignation or disability of his widow at any time, the vacancy caused thereby shall not be filled but the surviving trustees shall act. In the event of the death, resignation or disability of Bernard H. Ridder at any time, one of his brothers shall act as trustee in his place and stead, and in the event of the death, resignation or disability of Elmer E. Todd at any time, one of the partners of the law firm now representing Blethen shall acts as trustee in his place and stead. Such last Will and Testament or other trust instrument shall also provide

that upon the termination of the trust, Blethen's Class B common stock shall be distributed by the trustees among the surviving sons of said Blethen and the issue of such of them as may be deceased, in equal shares, per stirpes. Such last will and Testament, or other trust instrument, shall further provide that, in case of any difference or differences of opinion between the said trustees as to any question connected with the management of the corporation, the Class B common stock of which is to constitute the corpus of the trust, any trustee may submit such a question for arbitration, upon notice to the other trustees, to the then general manager of The Associated Press, and in any such case the decision of the said then general manager of The Associated Press shall be final and conclusive and be binding upon all of said trustees. Provided, however, that if said Blethen transfers, to a holding corporation to be formed by him, any of his Class B common stock in Seattle Times Company a Delaware corporation (not less, in any event, then fifty-one (51) per cent of such stock at any time issued and outstanding), as permitted by the Fifth paragraph of the agreement of December 30, 1929, as herein modified, his last Will and Testament shall contain suitable provisions that not less than sixty (60) per cent of the voting stock of such holding corporation shall pass to the trustees above named, to be held in trust for the same period and under the same terms and conditions hereinabove provided."

(3) Paragraph Ninth of said agreement of De-

ember 30, 1929, is hereby modified and amended to read as follows:

Ninth: In the event that Blethen should at any time before the expiration of twenty-one (21) years from December 30, 1929, be adjudicated incompetent to manage [54] his affairs or estate, it is desired, and he hereby recommends that any Court which has jurisdiction over the appointment of a guardian, committee or conservator of his estate, appoint as such guardians, committee or conservators, as the case may be, the persons hereinabove specified to be the trustees under such last Will and Testament or other trust instrument to be made by him. Blethen directs and requests any guardians, committee or conservators that may be appointed for his estate that any difference of opinion that may arise between them with respect to the management of the corporation, the Class B common stock of which forms a part of his estate, be submitted for arbitration to the then general manager of The Associated Press and that such guardians, committee or conservators accept the decision of such then general manager of The Associated Press as final and conclusive. Provided, that the above recommendations and directions shall also apply to Blethen's voting stock in a holding corporation provided for and permitted by the provisions of the Fifth and Eighth paragraphs of the agreement of December 30, 1929, as herein modified."

In Witness Whereof, the parties hereto have executed this instrument as of the day and year first above written.

C. B. BLETHEN
RIDDER BROTHERS
By VICTOR F. RIDDER [55]

[Title of District Court and Cause.]

AFFIDAVIT OF F. D. HAMMONS

State of Washington
County of King—ss.

F. D. Hammons, being first duly sworn, on oath deposes and says:

That he is Secretary of Seattle Times Company, a Delaware corporation, one of the defendants in the above entitled action. That he makes this affidavit in support of the motion of the defendants to dismiss this action because of want of jurisdiction and especially to show that all matters alleged in Paragraph XXI of plaintiff's complaint to be in controversy herein have become moot.

That, since the filing of plaintiff's complaint in this action, the regular annual meeting of the stockholders of said Seattle Times Company for the year 1943 was held in Seattle, Washington on January 19, 1943. That at such meeting all of the Class B common stock of said Seattle Times Company was represented in person or by proxy. That the four hundred ninety five (495) shares of such stock owned by the plaintiff in this [58] action was repre-

sented by Joseph E. Ridder, its President and proxy, and that at such meeting an entire new Board of Directors of the corporation, to serve for the ensuing year, was elected by unanimous vote of all such Class common stock and that, pursuant to such election, such new Directors took office on January 19, 1943.

F. D. HAMMONS

Subscribed and sworn to before me this 28th day of May, 1943.

JANE CARMODY

Notary Public for the State of Washington, residing at Seattle.

[Endorsed]: Copy received May 28, 1943.

JONES & BRONSON,
Attys. for Pl.

[Endorsed]: Filed May 28, 1943. [59]

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendants, Rae Kingsley Blethen, F. D. Hammons and William K. Blethen, as executors of the Estate of Clarence B. Blethen, Deceased, Rae Kingsley Blethen, Francis A. Blethen, William K. Blethen, John Alden Blethen, The Blethen Corporation, a corporation, and Seattle Times Company, a corporation, moves the Court to dismiss this action on the ground that the Court lacks jurisdiction, because the amount actually in controversy is less than \$3,000.00, exclusive of interest and costs;

and said defendants deny the allegation contained in paragraph IV of plaintiff's Complaint, that the matter in controversy in the action exceeds, exclusive of interest and costs, the value of \$3,000.00.

McMICAEN RUPP &

SCHWEPPE

OTTO B. RUPP

J. GORDON GOSE

Attorneys for Defendant, Se-
attle Times Company

HOLMAN, SPRAGUE &

ALLEN

HULBERT, HELSELL & PAUL

CHARLES H. PAUL

Attorneys for Defendants,
Rae Kingsley Blethen, F. D.
Hammons and William K.
Blethen, as executors of the
Estate of Clarence B.
Blethen Deceased, Rae
Kingsley Blethen, Francis
A. Blethen, William K.
Blethen, John Alden Blethen,
and The Blethen Corporation.

Copy Rec'd 4/26/43 Jones & Bronson. [60]

[Endorsed]: Filed April 26, 1943.

[Title of District Court and Cause.]

STIPULATION RE ALLEGATION OF
COMPLAINT

It is hereby stipulated by and between the parties hereto that solely for the purposes of consideration and disposition of defendants' motion to dismiss plaintiff's complaint that all allegations of fact contained in said complaint not expressly denied by said motion and particularly the allegations of fact contained in Paragraphs XI and XV of said complaint are admitted to be true.

Dated this 3rd day of June, 1943.

JONES & BRONSON
OPPENHEIMER, HODGSON,
BROWN, DONNELLY &
BAER

MYLES. B. AMEND

Attorneys for Plaintiff
McMICKEN, RUPP &
SCHWEPPE

OTTO B. RUPP

J. GORDON GOSE

Attorneys for Defendant, Se-
attle Times Company.

HULBERT, HELSELL & PAUL
CHAS. H. PAUL

HOLMAN, SPRAGUE & ALLEN

Attorneys for Defendants,
Rae Kingsley Blethen, F. D.
Hammons and William K.
Blethen, as executors of the
Estate of Clarence B.

Blethen, D e c e a s e d, Rae
Kingsley Blethen, Francis
A. Blethen, William K.
Blethen, John Alden Bleth-
en, and The Blethen Cor-
poration.

[Endorsed]: June 4, 1943. [62]

[Title of District Court and Cause.]

MOTION RE PRESENTATION OF EVIDENCE

Comes now the plaintiff herein by and through its attorneys of record undersigned and moves the above entitled Court that, in the event the Court is not willing to accept as true the allegations of fact pleaded in the complaint other than the general allegation of value contained in Paragraph IV of the complaint as a basis for consideration and disposition of defendants' motion to dismiss in accordance with the stipulation of the parties, plaintiff be given an opportunity to present evidence in support of its complaint relative to the value of the matter in controversy.

JONES & BRONSON

OPPENHEIMER, HODGSON,
BROWN, DONNELLY &
BAER

MYLES B. AMEND

Attorneys for Plaintiff

[Endorsed]: Filed June 4, 1943. [63]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 613

RIDDER BROTHERS, Incorporated, a corpora-
tion,

Plaintiff

vs.

RAE KINGSLEY BLETHEN, F. D. HAMMONS
and WILLIAM K. BLETHEN as executors
of the Estate of Clarence B. Blethen, Deceased,
RAE KINGSLEY BLETHEN, FRANCIS A.
BLETHEN, WILLIAM K. BLETHEN,
JOHN ALDEN BLETHEN, CLARANCE B.
BLETHEN, THE BLETHEN CORPORA-
TION, a corporation, and SEATTLE TIMES
COMPANY, a corporation,

Defendants.

JUDGMENT OF DISMISSAL

This matter having come regularly on for hearing before the undersigned, one of the judges of the above entitled court, on defendants' motion to dismiss the action because the amount in controversy is less than \$3000.00 exclusive of interest and costs, and counsel for both plaintiff and defendants having been heard, and the Court being fully advised in the premises and having read and accepted the stipulation of the parties as to the truth of the allegations of plaintiff's complaint for the purposes of the said motion, does now find as follows:

That there is no satisfactory proof of the value of the right to vote the corporate stock involved in the first matter in controversy and referred to in paragraphs 1 and 2 of the prayer of plaintiff's complaint.

That the value to plaintiff of the second matter in controversy, as referred to in paragraph 3 of the prayer of plaintiff's complaint, is nominal and less than \$3000.00 exclusive of interest and costs.

That the loss of detriment to defendants if plaintiff should prevail on the second matter in controversy, as referred to in paragraph 3 of the prayer of plaintiff's complaint, exceeds in value the sum of \$3000.00 exclusive of interest and costs. [64]

That the above entitled proceeding does not involve the requisite jurisdictional amount and that the Court does not have jurisdiction of the action.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the above entitled action is dismissed for want of jurisdiction and that defendants recover their costs.

Done in open court this 14th day of June, 1943.

JOHN C. BOWEN

District Judge

Presented by:

STORY BIRDSEYE

Of counsel for Pl.

Approved as to Form:

Attorneys for Plaintiff.

[Endorsed]: Filed June 14, 1943. [65]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Ridder Brothers, Incorporated, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the 9th Circuit from the Final Judgment entered in this action on the 14th day of June, 1943.

Signed:

JONES & BRONSON
STORY BIRDSEYE
OPPENHEIMER, HODGSON,
BROWN, DONNELLY &
BAER
MYLES B. AMEND

Attorneys for Appellant, Rid-
der Brothers, Incorporated,
a corporation.

[Endorsed]: Filed July 6, 1943. [66]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, Ridder Brothers, Incorporated, a corporation, plaintiff and appellant above named, as Principal, and Saint Paul-Mercury Indemnity Company, a corporation organized under the laws of the State of Delaware and duly authorized to transact business in the State of Washington, as Surety, are held and firmly bound unto Rae Kingsley Blethen, F. D.

Hammons and William K. Blethen, as executors of the Estate of Clarence B. Blethen, Deceased, Rae Kingsley Blethen, Francis A. Blethen, William K. Blethen, John Alden Blethen, Clarence B. Blethen, The Blethen Corporation, a corporation, and Seattle Times Company, a corporation, the defendants and appellees above named, in the just and full sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, and successors and assigns, jointly and severally, firmly by these presents.

Dated and Sealed this 6th day of July, 1943.

Whereas on the 14th day of June, 1943 the above entitled court rendered and entered a judgment in the above entitled cause in favor of the above named obligees and against the above named principal, and [67]

Whereas the said principal, feeling aggrieved by said judgment and desiring to appeal from the same to the United States Circuit Court of Appeals for the 9th Circuit and perfect said appeal by this bond,

Now, Therefore, the condition of the above obligation is such that if the said principal will pay all costs that may be awarded against it if the appeal is dismissed or the judgment affirmed, or such costs as may be awarded against it if the judgment is modified, not exceeding the sum of Two Hundred Fifty (\$250.00) Dollars, then this obligation

shall be void, otherwise to remain in full force and effect.

RIDDER BROTHERS, INCOR-
PORATED

By JONES & BRONSON
STORY BRIDAGE
OPPENHEIMER, HODGSON,
BROWN, DONNELLY &
BAER

MYLES B. AMEND

(Its Attorneys)

(Principal)

SAINT PAUL-MERCURY IN-
DEMNITY COMPANY

of Saint Paul,

By D. WILSON

(Attorney-in-Fact)

[Seal] (Surety)

Countersigned:

By DOROTHY WILSON

Resident Agent

[Endorsed]: Filed July 6, 1943. [68]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-

written transcript of record, consisting of pages numbered from 1 to 73 inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by the designation of the record on appeal filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate of [72] return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Act February 11, 1925)	
for making record, certificate of re-	
turn, 172 folios at .05c	\$ 8.60
and 10 folios as .15c	1.50
Appeal fee, (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of	
Record50
	<hr/>
Total	\$15.60

I further certify that the foregoing fees have been paid by the Appellant, Ridder Brothers, Incorporated, a corporation.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 23rd day of July, 1943.

[Seal]

JUDSON W. SHORETT,
Clerk

By E. M. ROSSER
Deputy [73]

[Endorsed]: No. 10504. United States Circuit Court of Appeals for the Ninth Circuit. Ridder Brothers, Incorporated, a Corporation, Appellant, vs. Rae Kingsley Blethen, F. D. Hammons and William K. Blethen, as Executors of the Estate of Clarence B. Blethen, Deceased; Rae Kingsley Blethen; Francis A. Blethen; William K. Blethen; John Alden Blethen; Clarence B. Blethen; The Blethen Corporation, a Corporation; and Seattle Times Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 26, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10504

RIDDER BROTHERS, Incorporated, a corporation,

Appellant,

vs.

RAE KINGSLEY BLETHEN, F. D. HAMMONS
and WILLIAM K. BLETHEN, as executors
of the Estate of Clarence B. Blethen, Deceased,
RAE KINGSLEY BLETHEN, FRANCIS A.
BLETHEN, WILLIAM K. BLETHEN,
JOHN ALDEN BLETHEN, CLARANCE B.
BLETHEN, THE BLETHEN CORPORATION,
a corporation, and SEATTLE TIMES
COMPANY, a corporation,

Appellees.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF PARTS
OF RECORD TO BE PRINTED

Comes now Ridder Brothers, Incorporated, a corporation and respectfully advises the Court that it intends to rely, on its Appeal from that certain final judgment in the District Court of the United States for the Western District of Washington, Northern Division made and entered on the 14th day of June, 1943, upon the following points:

1. The Court erred in rendering judgment dismissing the action for want of jurisdiction.

2. The Court erred in deciding that the matters in controversy in the action do not exceed, exclusive of interest and costs, the sum or value of \$3,000.00.

3. The Court, having found that the loss or detriment to defendants if plaintiff should prevail on the second matter in controversy, as referred to in paragraph 3 of the prayer of plaintiff's complaint, exceeds in value the sum of \$3,000, exclusive of interest and costs, erred in dismissing the action for want of the jurisdictional amount, for the test in determining whether or not the jurisdictional amount is involved in a given controversy is whether or not the possible loss or detriment to the defendant, as well as the possible gain to the plaintiff, exceeds \$3,000.00 exclusive of interest and costs. In other words, the value of the matter in controversy, means the pecuniary result to either party which the judgment entered in the cause would directly produce, either at once or in the future.

Appellant hereby designates that the following parts of the record, being necessary for the consideration of the foregoing points, be printed:

1. Complaint
2. Affidavit of F. D. Hammons
3. Motion to Dismiss
4. Stipulation
5. Motion
6. Judgment of Dismissal

7. Notice of Appeal

8. Bond on Appeal

JONES & BRONSON

STORY BIRDSEYE

OPPENHEIMER, HODGSON,

BROWN, DONNELLY &

BAER

MYLES B. AMEND

Attorneys for Appellant, Rid-
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a corporation.

Copy received July 26, 1943.

McMICKEN, RUPP &

SCHWEPPE

Attorneys for Seattle Times
Company

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HULBERT, HELSELL & PAUL

HOLMAN SPRAGUE & ALLEN

Attorneys for Rae Kingsley
Blethen et al.

[Endorsed]: Filed Jul 28 1943. Paul P. O'Brien,
Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

RIDDER BROTHERS, Incorporated, a corporation,
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Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
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NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S OPENING BRIEF

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FILED

OCT 4 - 1943



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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

RIDDER BROTHERS, Incorporated, a corporation,
Appellant,
vs.

RAE KINGSLEY BLETHEN, F. D. HAMMONS and
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Estate of Clarence B. Blethen, Deceased;
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BLETHEN; WILLIAM K. BLETHEN; JOHN
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THE BLETHEN CORPORATION, a Corporation;
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tion,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S OPENING BRIEF

JURISDICTION

The above cause is here on appeal from judgment of dismissal made and entered by the District Court of the United States, Western District of Washington, Northern Division.

There is diversity of citizenship. Appellant is a New Jersey corporation. Appellee, The Blethen Corporation, is a Washington corporation, and ap-

pellee, Seattle Times Company, is a Delaware corporation. (Tr. 3). The remaining appellees are residents of the State of Washington. Whether or not the matter in controversy exceeds, exclusive of interest and costs, the value or sum of \$3,000 presents the issue on this appeal. It is the position of appellant that the requisite amount is involved, and, there being diversity of citizenship, that the District Court has jurisdiction as provided in United States Judicial Code (28 U.S.C.A. 41 (1)).

The defendants in the action with the exception of Clarence B. Blethen moved the District Court for a dismissal on the ground that the court "lacks jurisdiction, because the amount actually involved is less than \$3,000, exclusive of interest and costs." (Tr. 80). The motion of these moving defendants, appellees here, was granted by the District Court and that Court on the 14th day of June, 1943, made and entered the judgment of the court dismissing the action for want of jurisdiction, the District Court being of the opinion that the statutory amount was not involved. (Tr. 84). Notice of appeal was filed on July 6, 1943, (Tr. 86) and a cost bond in the sum of \$250 was posted on the same day (Tr.86).

The Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Section 128a of the United States Judicial Code (28 U.S.C.A. 225 (a)).

STATEMENT OF THE CASE

This suit is one in substance to enforce specific performance of a contract between Clarence B. Blethen, the former publisher of the Seattle Times,

and Bernard H. Ridder, Joseph E. Ridder and Victor F. Ridder, as co-partners doing business as Ridder Brothers. The contract, designated by the parties, "Supplemental Agreement," (Exhibit D, Tr. 56) was executed December 30, 1929, and was amended several times during the next few months. (Exhibits E, F and G, Tr. 65, 69 and 74). The facts as to the execution and performance under this contract as amended as well as to the execution and performance under the principal contract (Exhibit A, Tr. 31) (to which the one herein involved is "supplemental") are set forth in detail in the complaint. (Tr. 3 to 79).

At the time of the execution of these contracts (December 30, 1929) Seattle Times, Incorporated, a Nevada corporation, was the owner and publisher of a daily newspaper in the City of Seattle, Washington, named the Seattle Times. The main contract provided in brief for the transfer by the owners of stock in the Nevada company of their stock in that company to a corporation to be organized under the laws of Delaware; for the creation of several classes of stock in the Delaware corporation, including a class of stock to be known as Class B common stock, such Class B common stock to be divided into 1000 shares and to have full voting rights subject only to the right of the holders of the preferred stock to exercise voting powers in the event of default in the payment of dividends on such preferred stock; for distribution of the several classes of stock as in the agreement provided, and for the considerations therein stated, the Ridder Brothers to take 2,690

shares of the preferred stock, 13,000 of the Class A common stock and 440 shares of the Class B common stock, and to pay therefor the sum of \$1,541,970 (Tr. 50), and C. B. Blethen to take in consideration of the transfer of his stock in the Nevada corporation, 352.94 shares of the common stock thereof, to the Delaware corporation and payment to him of \$280,980 cash, 7,310 shares of the preferred stock, 7,000 shares of the Class A common stock and 560 shares of the Class B common stock (Tr. 49); and for the execution of a supplemental agreement as provided in paragraph Nineteenth of the main contract reading as follows:

“The parties hereto of the first and third parts have, simultaneously with the execution and delivery of this agreement, entered into another agreement bearing even date herewith, and hereinafter referred to as the ‘supplemental agreement’. The closing of this agreement is contingent upon the performance by the parties of the first and third parts of all of the terms, clauses, covenants and conditions to be performed under such supplemental agreement between them and in the event that such other agreement is not completed and/or closed, this agreement is to be deemed null and void.”

The supplemental agreement was executed on the 30th day of December, 1929 (Tr. 56).

The Delaware corporation was organized. All the stock in the Nevada corporation was transferred thereto, along with all the assets of the Nevada corporation, as in the main contract provided. Payments were made as therein provided and the other details carried out, resulting in the taking over of the newspaper Seattle Times by the Delaware cor-

poration, and the publication thereupon and thereafter by the Delaware corporation of that newspaper, with C. B. Blethen and the Ridders in the management thereof as provided in the supplemental agreement (Tr. 9).

Following the carrying out of these contracts, the voting stock of the Delaware corporation, appellee Seattle Times Company, the Class B common stock, was held as follows: C. B. Blethen 550 shares, Ridder Brothers 440 shares and Elmer E. Todd 10 shares (Tr. 10).

Subsequent to the carrying out of these contracts, C. B. Blethen organized The Blethen Corporation, a holding company, and transferred to this corporation, as he had a right to do under the provisions of these contracts, 455 shares of his Class B common stock in the Delaware corporation. Blethen's ownership of stock in The Blethen Corporation was at the time and continued to be up to the time of his death 60% thereof as required under the provisions of paragraph "Eighth" of the supplemental agreement.

Blethen passed away on the 30th day of October, 1941. At the time of his death the Class B common stock of the Delaware corporation was held as follows: C. B. Blethen 39 shares, The Blethen Corporation 455 shares, Rae Kingsley Blethen, wife of Blethen, one share, Elmer Todd 10 shares and Ridder Brothers 495 shares. (Tr. 10, 11).

Paragraph "Eighth" of the supplemental agreement (Tr. 76) provides as follows:

"Eighth: Blethen agrees, immediately after the issuance of Class B common stock to him, to make a last Will and Testament, or some other instrument in writing, which will provide in effect that his Class B common stock be held in trust by his trustees after his death for a period of twenty-one (21) years from December 30, 1929. Such last will and Testament or other trust instrument shall also provide that Blethen's Class B common stock shall not be sold by his trustees until the termination of such trust. Such last Will and Testament or other trust instrument shall constitute, nominate and appoint the widow of said Blethen as one of the trustees, Bernard H. Ridder, another of such trustees, and Elmer E. Todd, the third of such trustees. It shall further provide that, in the event of the death, resignation or disability of his widow at any time, the vacancy caused thereby shall not be filled but the surviving trustees shall act. In the event of the death, resignation or disability of Bernard H. Ridder at any time, one of his brothers shall act as trustee in his place and stead, and in the event of the death, resignation or disability of Elmer E. Todd at any time, one of the partners of the law firm now representing Blethen shall act as trustee in his place and stead. Such last Will and Testament or other trust instrument shall also provide that upon the termination of the trust, Blethen's Class B common stock shall be distributed by the trustees among the surviving sons of said Blethen and the issue of such of them as may be deceased, in equal shares, per stirpes. Such last Will and Testament, or other trust instrument, shall further provide that, in case of any difference or differences of opinion between the said trustees as to any question connected with the management of the corporation, the Class B common stock of which is to constitute the corpus of the trust, any trustee may submit such a question for arbitration, upon notice to the other trus-

tees, to the then general manager of The Associated Press, and in any such case the decision of the said then general manager of The Associated Press shall be final and conclusive and be binding upon all of said trustees. Provided, however, that if said Blethen transfers, to a holding corporation to be formed by him, any of his Class B common stock in Seattle Times Company a Delaware corporation (not less, in any event, than fifty-one (51) per cent of such stock at any time issued and outstanding), as permitted by the Fifth paragraph of the agreement of December 30, 1929, as herein modified, his last Will and Testament shall contain suitable provisions that not less than sixty (60) per cent of the voting stock of such holding corporation shall pass to the trustees above named, to be held in trust for the same period and under the same terms and conditions hereinabove provided."

By these provisions of the supplemental agreement Blethen was obligated to make a last will and testament or execute some other instrument in writing which would provide:

1. " * * * in effect that his Class B common stock be held in trust by his trustees *after his death* for a period of twenty-one (21) years from December 30, 1929";

2. For the appointment of the widow of Blethen, Bernard H. Ridder, one of the Ridder Brothers, and Elmer E. Todd as trustees;

3. For provision in the will or other instrument that "in case of any difference or differences of opinion between the said trustees as to any question connected with the management of the corporation, the Class B common stock of which is to constitute the corpus of the trust, any trustee may submit such a question for arbitration, upon notice to the other trus-

tees, to the then General Manager of the Associated Press, and in any such case the decision of the said then General Manager of the Associated Press shall be final and conclusive and be binding upon all of said trustees"; and

4. For the distribution of the stock at the end of the trust period "among the surviving sons of said Blethen and the issue of such of them as may be deceased, in equal shares, per stirpes."

It is to be noted that paragraph "Eighth" contained provisions authorizing the transfer by Blethen of his Class B common stock in the Delaware corporation or a part thereof to a holding company organized by him, and providing that Blethen should at all times have not less than 60% of the voting stock of such holding corporation, and that such stock should pass to the trustees and be held in trust for the same period and under the same terms and conditions as set forth with respect to the Class B common stock of the Delaware corporation, Seattle Times Company.

On or about June 28, 1930, Blethen delivered to the Ridder Brothers a copy of a will which he stated he proposed to execute as a compliance with the requirements of the supplemental agreement. This will was a compliance therewith, and the Ridder Brothers expressed satisfaction therewith. (Tr. 11-16). Whether or not this will was ever actually executed is not known. Be this as it may, on December 4, 1940, Blethen executed another will, and following his death this will was admitted to probate and his estate is being probated thereunder in the Superior Court of the State of Washington for King

County. The Ridders knew nothing of this will of 1940 until presented for probate. The claim of the appellant in this suit is that the will does not carry out the provisions of paragraph "Eighth" of the supplemental agreement, is a violation thereof and constitutes a breach of such agreement. The will fails to provide that the stock in question "be held in trust by his trustees *after his death*" for the period specified in the supplemental agreement. It provides for the control in voting of this stock for the period required to probate the estate of Blethen by the executors appointed under the terms of the will. These executors are persons other than the trustees specified in the supplemental agreement. The provision of the supplemental agreement that the designated trustees take over "*after his death*" subject to adjustment of disputes by the Manager of the Associated Press, is deferred by the will until the conclusion of the probate proceedings which have been going on since November, 1941, with the end thereof not in view. This, it is the contention of appellant is not in compliance with the supplemental agreement which provided that his will should make provision for taking over by the designated trustees "*after his death*". And this will fails to provide for distribution of the stock to all of the surviving sons of Blethen "and the issue of such of them as may be deceased, in equal shares, per stirpes." Clarence B. Blethen II, one of Blethen's surviving sons, is, along with his issue, disinherited under the terms of this will. This, appellant contends, con-

stitutes a violation of the supplemental agreement, providing that at the termination of the trust period the stock to be placed in trust should be distributed equally to the surviving sons and the issue of such of them as may be deceased, in equal shares, per stirpes.

This suit was brought by Ridder Brothers, Incorporated, to whom the Ridder Brothers as partners assigned their interest in the supplemental agreement.

We have thus briefly outlined the facts as alleged in appellant's complaint so that the court may have before it the situation in its entirety involved in this litigation. The merits of the case, of course, were not before the lower court on the motion to dismiss, nor are the merits before this court on appeal. The issue before the lower court and the issue here is whether or not the matters in controversy involve the amount requisite to give the District Court jurisdiction.

In this action appellant first prays that the stock now held by the executors be conveyed to the trustees forthwith or that in the alternative the executors be instructed to vote the same as directed by the trustees designated in the supplemental agreement. (Tr. 28, 29). Appellant also prays for a decree adjudging that the stock be held in trust for the benefit of Clarence B. Blethen II as well as the other three of Blethen's surviving sons, as required by the supplemental agreement. (Tr. 29). As heretofore pointed out, the stock involved is 39 shares of the Class B common stock of the Seattle Times Com-

pany and the controlling stock of The Blethen Corporation which company, in turn, owns 455 shares of the said Class B common stock.

Relief of this nature is proper and is well supported by the authorities.

McCullough v. McCullough, 153 Wash. 625; 280 Pac. 70;

Fields v. Fields, 137 Wash. 592, 243 Pac. 369;

Worden v. Worden, 96 Wash. 592, 165 Pac. 501;

Wayman v. Miller, 195 Wash. 457, 81 P. (2d) 501;

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Clark v. Crist, 178 Wash. 187, 34 P. (2d) 360;

Jones v. Seattle Title & Trust Co., 157 Wash. 507, 289 Pac. 36;

Lager v. Berggren, 187 Wash. 462, 60 P. (2d) 99;

Luther v. National Bank of Commerce, 2 Wash. (2d) 470, 98 P. (2d) 667;

Alexander's Commentaries on Wills, Vol. 1, Sec. 107;

Alexander's Commentaries on Wills, Vol. 1, Page 168;

25 R.C.L. 306 (Sec. 120) and 311 (Sec. 125);

58 C. J. 1060.

The District Court dismissed the action for lack of jurisdiction, being of the opinion that the jurisdictional amount was not involved. In reference to the first matter in controversy (control of the stock in question) the court, in dismissing the action, found:

"That there is no satisfactory proof of the value of the right to vote the corporate stock involved in the first matter in controversy and referred to in paragraphs 1 and 2 of the prayer of plaintiff's complaint." (Tr. 85.)

On the second matter in controversy (the enforce-

ment of a trust in favor of all four surviving sons including Clarence B. Blethen II, disinherited under the will) the court ruled:

"That the value to plaintiff of the second matter in controversy as referred to in paragraph 3 of the prayer of plaintiff's complaint, is nominal and less than \$3000.00 exclusive of interest and costs.

That the loss or detriment to defendants if plaintiff should prevail on the second matter in controversy, as referred to in paragraph 3 of the prayer of plaintiff's complaint, exceeds in value the sum of \$3000.00 exclusive of interest and costs." (Tr. 85)

With respect to this last finding, the same is supported by the allegations of the complaint (Par. XI, Tr. 10) and the stipulation of the parties. (Tr. 82)

This appeal is taken from the judgment of dismissal.

SPECIFICATION OF ERRORS

On this appeal appellant relies on the following errors of the District Court:

"1. The Court erred in rendering judgment dismissing the action for want of jurisdiction.

2. The Court erred in deciding that the matters in controversy in the action do not exceed, exclusive of interest and costs, the sum or value of \$3,000.00.

3. The Court, having found that the loss or detriment to defendants if plaintiff should prevail on the second matter in controversy, as referred to in paragraph 3 of the prayer of plaintiff's complaint, exceeds in value the sum of \$3,000, exclusive of interest and costs, erred in dismissing the action for want of the jurisdictional amount, for the test in determining

whether or not the jurisdictional amount is involved in a given controversy is whether or not the possible loss or detriment to the defendant, as well as the possible gain to the plaintiff, exceeds \$3,000.00 exclusive of interest and costs. In other words, the value of the matter in controversy, means the pecuniary result to either party which the judgment entered in the cause would directly produce, either at once or in the future."

SUMMARY

The question on this appeal is the test to be applied in determining whether or not the jurisdictional amount is present. It is appellant's contention that the value of the matter in controversy means the pecuniary result to either party which the judgment in the cause would directly produce either at once or in the future. Appellants contend that it is the value to plaintiff only that controls; and this was the view of the lower court.

As to the matters in controversy, the one as to the right of the designated trustees to control the stock in question having been referred to below and referred to herein as the first matter in controversy, and the one as to the right to establish a trust in favor of the disinherited son having been referred to below and referred to herein as the second matter in controversy, if the court has jurisdiction as to either thereof, it has jurisdiction as to the other, as jurisdiction once obtained will attach for all purposes.

ARGUMENT

Second Matter In Controversy

The District Court found that if appellant prevailed on the second matter in controversy, the value to it of the judgment would be nominal but *that the loss to appellees would exceed* the jurisdictional amount. Relying on cases that speak of the test as being "the value of the object to be gained by complainant" and the "value to plaintiff of the right which he seeks to protect" and others using similar expressions, the Court concluded that the matter had to be viewed solely from the plaintiff's viewpoint and accordingly found that there was no jurisdiction.

There are, of course, a great many decisions employing such expressions. In fact in many instances the problem of jurisdiction can be determined most easily by considering the monetary value of the relief that plaintiff is seeking. How much in damages is he suing for? What is the value of the right which he is seeking to protect or enforce? Frequently, too, defendant's prospective loss is the same as plaintiff's prospective gain. For instance, in *Electro-Therapy Products v. Strong*, (C.C.A. 9), 84 F. (2d) 766, plaintiff sued to compel specific performance of a contract to assign certain inventions. This Court held that the matter in controversy was plaintiff's right to have the inventions assigned to it and that it was the value of this right that governed. This, the court said, depended on the value of the inventions. Obviously plaintiff's gain and defendant's loss were one and the same so that the case

could have been decided from the viewpoint of either litigant. The pecuniary result to either party exceeded the jurisdictional amount. We do not think the court intended in this case to announce any rule of general or universal application as to whether or not the requisite amount is involved to give the Federal Court jurisdiction.

In some instances the value to plaintiff involves the requisite sum whereas the loss to defendant does not and, in such instances, the courts have accepted jurisdiction. For instance, in *Glenwood Light and Water Co. v. Mutual Light, Heat and Power Co.*, 239 U. S. 121, 60 L. Ed. 174, 36 S. Ct. 30, the plaintiff sought to restrain the defendant from so erecting poles and wires as to injure and interfere with plaintiff's poles, wires and business. The value of plaintiff's right to be free from this interference was worth more than \$3,000 while it would have cost the defendant less than that sum to remove the obstructions. The requisite amount being present so far as one litigant was concerned, the court properly accepted jurisdiction saying that the value of plaintiff's right not to have its business interfered with was determinative. The same result would unquestionably have been reached had the value to plaintiff been less than \$3,000 but the cost to defendant of removing the poles and wires had been in excess of that sum. *Mississippi and Missouri Railroad Company v. Ward*, 2 Black 485, 67 U. S. 485, 17 L. Ed. 311.

Accordingly, it is necessary to analyze the cases carefully because the statement in a decision that it

is the value to plaintiff that controls does not by any manner of means indicate that that particular court is of the opinion that the possible loss to defendant can not also be considered. The only authorities entitled to weight in this matter are those in which the court places emphasis on the defendant's loss, although plaintiff's value is likewise sufficient, together with those cases in which defendant's loss is sufficient but plaintiff's value is below the requisite amount.

The true rule seems to be that the value of the matter in controversy means the pecuniary result to either party which the judgment entered in the cause will directly produce either at once or in the future. This is a reasonable and just test. The monetary limitation on jurisdiction was designed to protect Federal Courts from inconsequential litigation. *Davis v. Mills*, (C.C. Conn.), 99 Fed. 39, *Thlusty v. Gillespie-Rogers-Pyatt Co.*, (D.C.E.D.N.Y.), 35 F. Supp. 910. The amount was first fixed at \$500 by the Judiciary Act of 1789 (Chap. 20, 1 St. at L. 73), was later raised to \$2000 (Chap. 373, 24 St. at L. 522) and now stands at \$3000 (Chap. 231, 36 St. at L. 1087, 28 U.S.C.A. 41 (1)). When either the plaintiff stands to gain the latter amount or the defendant stands to lose it, the purpose of the rule is satisfied. Such a rule is easy of application and it assures the courts that their work will be limited to substantial litigation.

At an early date, the rule or test for which appellant contends received the approval of the Supreme Court of the United States. In *Mississippi*

and *Missouri Railroad Company vs. Ward*, 2 Black 485, 67 U. S. 485, 17 L. Ed. 311, the plaintiff, part-owner of three steamboats navigating the Mississippi River, sued to abate an alleged nuisance consisting of defendants erection of a bridge across the river. He sought no damages but only the removal of the structure. There was no showing of the extent of the damage to plaintiff. It was obvious, however, that it would cost much more than the jurisdictional amount to remove the bridge. The Supreme Court held that this was sufficient to confer jurisdiction saying:

“But the want of a sufficient amount of damage having been sustained to give the Federal Court jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern.”

This decision and the principal therein announced has been approved by many subsequent Federal cases including the following opinions of the United States Supreme Court:

Hunt v. New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821, 27 S. Ct. 529;

Glenwood Light and Water Company v. Mutual Light, Heat and Power Company, 239 U. S. 121, 60 L. Ed. 174, 36 S. Ct. 30;

Packard v. Banton, 264 U. S. 140, 68 L. Ed. 596, 44 S. Ct. 257;

Healy v. Ratta, 292 U. S. 263, 78 L. Ed. 1248, 54 S. Ct. 700.

It is true, of course, that in some of these cases the value of the litigation was most easily measured from the plaintiff's viewpoint. In the ordinary situation the value to the plaintiff is equal to or in ex-

cess of the loss to the defendant and accordingly most cases can be disposed of by applying the test from the plaintiff's viewpoint. However, in those instances in which the value to the plaintiff is less than the jurisdictional amount but the defendant's loss exceeds that figure, the courts have not hesitated to allow jurisdiction.

For instance, in *Elliott vs. Empire Natural Gas Co.*, (C.C.A. 8), 4 F (2d) 493, the plaintiff sought an injunction to prevent the defendant from cutting off plaintiff's gas supply unless he paid a \$16 bill. Suit was originally brought in the State Court and the defendant sought to remove it because of diversity of citizenship and the fact that more than \$3,000 was involved. Their theory was that this litigation would establish their right to collect similar sums from a great many other people not parties to the action but situated similarly to plaintiff. It was obvious that from the plaintiff's standpoint the jurisdictional amount was not involved but the Circuit Court of Appeals for the Eighth Circuit, after carefully reviewing at length all of the leading decisions on the subject concluded that the pecuniary result to either party should be considered. They summarized their conclusion in the following language:

"We think 'the value of the matter in controversy,' as the term is used in section 24 of the Judicial Code, means the pecuniary result to either party which the judgment entered in the case would directly produce, either at once or in the future."

Although viewing the matter from the defend-

ant's viewpoint the court denied jurisdiction on the ground that the effect of the judgment on the defendant's relations with third parties was too indirect. On this point they said:

"It is what the appellees will directly lose in this suit that determines the jurisdictional value of the matter involved. It is not what they may lose as an indirect result of this suit."

The Circuit Court of Appeals for the Tenth Circuit recently had occasion to apply the same principal in *Ronzio vs. Denver & R. G. W. R. Co.*, (C.C.A. 10), 116 F. (2d) 604. In that action the plaintiff sued the Railroad Company in the State Court to quiet the title to certain water rights and to determine their respective priorities. The Railroad Company alleged diversity of citizenship and that the amount involved exceeded \$3,000. It was stipulated that the value to plaintiff of his claim to water rights did not exceed \$2,000 but that the value to the Railroad Company of the right to take and use the water claimed by plaintiff was in excess of \$3,000 and that, if plaintiff prevailed, the Railroad's detriment or loss would exceed the jurisdictional amount. Thus the case presented the exact problem that is now before the Court in the case at bar. After referring to several of the leading cases including the decision of the United States Supreme Court in *Smith vs. Adams*, 130 U. S. 167, 9 S. Ct. 566, 32 L. Ed. 895, the court held that the requisite jurisdictional amount was involved, saying:

"In determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint; the test for

determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce."

The same problem was presented to the District Court for the Southern District of Indiana in *Armstrong v. Townsend*, 8 F. Supp. 953. In that action the plaintiff, as a tax payer, sought to enjoin the auditor of the State of Indiana from paying the Lieutenant-Governor a salary of \$6,000 a year. If he prevailed, the saving to the plaintiff in taxes would have been nominal but the loss to the Lieutenant-Governor, who was a party defendant, would have exceeded the jurisdictional amount. The court held that the matter should be viewed from the defendant's viewpoint and that it accordingly had jurisdiction. They concluded:

"The value of the matter in controversy is the pecuniary result to either party which a decree would produce, either at present or in the future."

A similar result was reached in *Griffiths v. Enochs*, (D.C.W.D. La.), 43 F. Supp. 352. The court there said:

"The federal courts have interpreted the significance of like or similar facts in determining the 'value of the matter in controversy' under Section 24 of the Judicial Code, 28 U.S.C.A. § 41. The case of *Elliott v. Empire Natural Gas Co.*, 8 Cir., 4 F. 2d 493, is quite rehearsive of the jurisprudence. We quote the most pertinent paragraph: 'Many cases decided in the courts affect others indirectly who are not parties thereto. The alleged rights of appellees as against others who are not parties to the suit are not in dispute in this case, within the meaning of the statute. We think "the value of the

matter in controversy," as the term is used in Section 24 of the Judicial Code, means the pecuniary result to either party which the judgment entered in the case would directly produce, either at once or in the future."

An earlier case that is very frequently cited is *Cowell v. City Water Supply Co.*, (C.C.A. 8), 121 Fed. 53. In this case the plaintiff sued to recover on a \$1,000.00 bond or in the alternative to obtain judgment for \$1,650.00 against members of the Bondholders Committee. It was admitted that the amount which plaintiff sought to recover was less than the jurisdictional requirement but it was argued that the court had jurisdiction because plaintiff prayed that a \$475,000.00 mortgage given by the defendant be cancelled and annulled. The Circuit Court held that from the plaintiff's standpoint, he could not recover the jurisdictional amount and that so far as the defendant was concerned, it could not lose more than the plaintiff's interest in the mortgaged property which admittedly amounted to only \$1,650.00. They accordingly denied jurisdiction. In viewing the case from the standpoint of both litigants, the court, after reviewing earlier authorities, said:

"Perhaps these cases sufficiently illustrate and establish the rule that it is the amount or value of that which the complainant claims to recover, or the sum or value of that which the defendant will lose if the complainant succeeds in his suit, that constitutes the jurisdictional sum or value of the matter in dispute, which tests the jurisdiction of the Circuit Courts of the United States."

In *Miller v. First Service Corporation*, (C.C.A. 8),

84 F. (2d) 680, plaintiff sued to set aside a conveyance of real property by a judgment debtor and to subject the land to the lien of a judgment for a sum in excess of \$11,000. The value of the land was but \$960. The court ruled that the plaintiff only stood to gain \$960 and that the defendant could not lose more than that amount. In denying jurisdiction they said:

“The rule has long been settled that: ‘It is the amount or value of that which the complainant claims to recover, or the sum or value of that which the defendant will lose if the complainant succeeds in his suit, that constitutes the jurisdictional sum or value of the matter in dispute, which tests the jurisdiction of the Circuit Courts of the United States.’”

In this same connection the decision of the Supreme Court of the United States in *Smith v. Adams*, 130 U. S. 167, 32 L. Ed. 895, 9 S. Ct. 566, should not be overlooked. In that case plaintiff instituted an action against certain county commissioners challenging the validity of an election changing the location of the county seat. A demurrer to the complaint was first sustained but this ruling was reversed on appeal. From this latter decision the county commissioners appealed to the Supreme Court of the United States. The latter only had jurisdiction in the event that more than \$5,000 was involved. The Supreme Court denied jurisdiction on the ground that it was impossible to state any rule by which the benefit the county might gain or the damage it might suffer from the result of the contested election could be estimated. It is significant that they considered the matter from

the standpoint of the loss or benefit to the county, the officials of which were the original defendants. In justifying this position the Supreme Court said:

“By matter in dispute is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, *or by the pecuniary result to one of parties immediately from the judgment.*

(Italics ours.)

Another pertinent decision is that of *Harrison v. Grandison Co.* (D.C.E.D. La.), 34 F. Supp. 356, which was an action for slander of title. Plaintiff prayed for damages in the sum of \$3,000 and sought to quiet the title to mineral rights worth \$5,000. The court pointed out that, if plaintiff prevailed, his recovery would exceed in value the jurisdictional amount and that the defendant's loss would likewise exceed such sum. The court made quite a point of the fact that the test could be applied either from the standpoint of the plaintiff's gain or the defendant's loss, saying:

“When a litigant so seeks to obtain certain remedial relief, including compensatory damages, the pecuniary value of the matter in controversy (for the purpose of deciding the question of a Federal Court's jurisdiction vel non), may be arrived at by considering the increased or diminished value of the property directly affected by the remedial relief prayed for, or the pecuniary result to *one* of the parties im-

mediately from the judgment. *Smith v. Adams*, 1889, 130 U. S. 167, 9 S. Ct. 566, 32 L. Ed. 895. * * *

The amount or value of *that which the plaintiff seeks to recover*, or the amount or value *which the defendant will lose* if the plaintiff obtains the recovery that he seeks, is what should and does determine the question of jurisdiction; and the sum or value of *that* which is *here* in dispute, is certainly much over the jurisdictional sum prescribed by law. *Cowell et al. v. City Water Supply Co. et al.*, 8 Cir., 1903, 121 F. 53."

(Italics by the Court.)

In *New Jersey Federation of Young Men's and Young Women's Hebrew Associations v. Hoffman*, (D.C., M.D. Penn.), 25 F. Supp. 687, plaintiff sued to remove a cloud on the title to certain property. The court found that "the pecuniary result to both parties" as a consequence of the judgment sought by plaintiff would involve more than \$3,000 and accordingly sustained jurisdiction. In reaching this conclusion they said:

"In determining the amount in controversy for the purpose of deciding whether there is federal jurisdiction, the pecuniary result to either party which the decree would produce is the proper test. *Armstrong v. Townsend*, D.C., 8 F. Supp. 953; *Elliott v. Empire Natural Gas Co.*, 8 Cir., 4 F. 2d 493. The value of the object to be attained by the suit is the basic consideration. *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U. S. 121, 36 S. Ct. 30, 60 L. Ed. 174."

This rule was recognized by the District Court for the Eastern District of Kentucky in *Morrow v. Mutual Casualty Co. of Chicago*, 20 F. Supp. 193.

They there quote with approval the following statement from Hughes on Federal Practice:

“The value of the matter in controversy is the value of that which the complainant seeks to recover, or the value of that which the defendant will lose if the complainant obtains the recovery he seeks.”

The most recent pronouncement of the Supreme Court of the United States on this question appears in *Thomson v. Gaskill*, 315 U. S. 442, 86 L. Ed. 951, 62 S. Ct. 673. In that case a number of railroad employees sued to determine whether or not they had been wrongfully deprived of their seniority rights. In speaking of the test to be applied in determining if the jurisdictional amount was present, the court said:

“In a diversity litigation the value of the ‘matter in controversy’ is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation. *Wheless v. St. Louis*, 180 US 379, 382, 45 L ed 583, 585, 21 S Ct 402; *Oliver v. Alexander*, 6 Pet (US) 143, 147, 8 L ed 349, 350.

It was conceded that the claim of no single individual exceeded \$3,000 and the court pointed out that the record was too incomplete to enable them to determine whether or not the plaintiffs had a common undivided interest or were enforcing a single title or right so that their respective values could be totalled. It is, of course, well established that only under certain circumstances can a number of plaintiffs join together in a single action in a Federal Court. This rule must ordinarily be com-

plied with even though the total possible loss to the defendant will exceed the jurisdictional amount.

Appellant, of course, does not contend that the only requisite of jurisdiction is the loss or detriment to the defendant if plaintiff prevails. There are other prerequisites such as diversity of citizenship and in the case of numerous plaintiffs they must have a common and undivided interest or they must be asserting a single title or right.

A case exactly in point is the decision in *Crockett v. Overfield*, (D.C.E.D. Ida.), 22 F. Supp. 915. In this case an individual, presumably a tax payer, brought suit in a state court to have declared void a transfer of real property by a county to the defendant. The defendant removed the case to District Court and the plaintiff made a motion to remand. The value of the land exceeded the jurisdictional amount. In denying the motion to remand the court pointed out that the plaintiff was seeking to recover the property for the benefit of the county. In holding that the court had jurisdiction because the defendant would lose more than the jurisdictional amount if plaintiff prevailed, the court said:

"The title and right to the tracts of land is involved for the property is the real subject matter of the suit; *that is, the property the plaintiff is endeavoring to recover for the county and which the defendant stands to lose if the plaintiff is successful*, therefore the value of the property is the real amount in dispute."
(Italics ours.)

In *Hoover & Allen Co. v. Columbia Straw Paper Co.*, (C.C.S.D. Ohio W.D.), 68 Fed. 945, plaintiff sued in the state court for less than the federal

jurisdictional amount but attached property worth in excess of that sum. One of the defendants asserted a claim against all of the attached property and removed the case to the District Court. The plaintiff made a motion to remand on the ground that the jurisdictional amount was not involved and this motion was denied. The court ruled that the value of the land governed rather than the amount which plaintiff sought to recover. In other words, the fact that the defendant's loss might exceed the jurisdictional amount was sufficient though the plaintiff was suing for a lesser sum.

Another recent decision recognizing the rule for which appellant contends is *Enzor v. Jefferson Standard Life Insurance Co.*, (D.C.E.D. S. C.), 14 F. Supp. 677. In that case the court refers with approval to the statement of the rule by Hughes in his work on Federal Practice, Volume 1, Section 422, that the value of the matter in controversy is the value of that which the plaintiff seeks to recover or of that which the defendant may lose and that it is the pecuniary result to either party that governs.

This rule was early recognized in the District Court for the Western District of Washington in our local District Court. Judge Hanford, in *Oregon Railway & Navigation Co., v. Shell*, (C.C.D. Wash. S.D.), 125 Fed. 979, was concerned with a suit by a railroad to correct an alleged ambiguity in a deed describing a right of way and to restrain the removal of gates at a crossing over the right of way. The railroad attempted to sustain jurisdiction on the theory that it had a right to fence its right of

way and maintain gates and that, if it did not do so, serious accidents involving substantial damages might occur. The defendant land owners contended that the true test was the reasonable value of the right of way and the amount of damages that the defendant might be entitled to by reason of the construction and operation of the railroad. These latter items amounted to less than the jurisdictional amount. The court upheld the defendant and denied jurisdiction saying:

“It is my opinion that in the mere statement of the two opposing propositions the superior strength of the defendants’ position, in reason, is obvious; for if the court should grant a decree in favor of the complainant for all the relief demanded *it will gain and the defendants will lose* only the pecuniary advantage of having possession and complete control of the right of way, and the value thereof cannot be greater than the amount which the complainant would be obliged to pay to the defendants in order to acquire possession and complete control, if it did not claim to be already entitled thereto.”

(Italics ours.)

The rule was likewise followed in *National Lock Co. v. Chicago Regional Labor Board*, (D.C.N.D. Ill. W.D.), 8 F. Supp. 820. The plaintiff instituted suit in State Court and obtained a temporary injunction restraining defendant from acting with reference to a walkout of plaintiff’s employees. Defendant filed a transcript of the record in District Court and moved to dissolve the temporary injunction. The plaintiff filed a cross-motion to remand, thereby challenging the jurisdiction of the District Court on the ground that the requisite amount was

not involved. In denying jurisdiction the court quoted with favor the following from Section 13 of Foster on Federal Practice:

“In a suit for an injunction the value of a matter in dispute is that of the object of the bill, namely, the value to the plaintiff, of the right for which he prays protection or the value to the defendant, of the act of which the plaintiff prays prevention.”

They likewise quoted with approval the following from Section 129 (G) of Rose's Code of Federal Procedure:

“In a suit for an injunction the matter in dispute is not determined by the amount which the complainant might recover at law for the acts complained of, but by the value of the right to be protected or the extent of the injury to be prevented by the injunction.”

In holding that the jurisdictional amount was not present, they said:

“The court can not estimate the loss in money, if any, which the plaintiff will sustain should it prevail in its suit, nor can the court say how any calculable money value can accrue to the defendants by conducting a hearing or making its results public.”

In *Nueces Valley Town-Site Co. v. McAdoo*, (D.C. W.D. Tex.), 257 Fed. 143, plaintiff sued in State Court to enjoin a proposed change of location of certain employees of the Director General of Railroads. The case was removed to the District Court on the ground of diversity of citizenship, and a motion to remand was made. However, the defendant showed that the saving to the Railroad Administration by moving the employees would amount to at

least \$400 per month for 21 months. The court, viewing the matter from the standpoint of the defendant's loss, found the jurisdictional amount to be present and denied the motion.

In suits involving nuisances the question of whether or not the requisite amount is involved is frequently considered from the viewpoint of the defendant. See:

Whitman v. Hubbell, 30 Fed. 81;

American Smelting and Refining Co. v. Godfrey, (C.C.A. 8) 158 Fed. 225; writ of Certiorari denied in 207 U. S. 597, 52 L. Ed. 357, 28 S. Ct. 262;

Amelia Mill Co. v. Tenn. Coal, Iron and R. Co., 123 Fed. 811.

The rule is frequently applied, too, in suits brought by stockholders or creditors seeking the appointment of a receiver. The test is particularly applicable when the proposed receivership is intended to conserve and distribute the property of the corporation. For examples of the application of the rule in stockholders' suits, see:

Towle v. American Bldg. Loan & Investment Society, 60 Fed. 131;

Taylor v. Decatur Mineral & Land Co., 112 Fed. 449;

Cole v. Philadelphia & E. R. Co., 140 Fed. 944;

Klein v. Wilson & Co., 7 F. (2d) 772, Affirmed (C.C.A. 3), 7 F. (2d) 777;

King v. Kansas City Police Relief Association, 60 F. (2d) 547;

For the application of this rule in creditors' suits, see:

Putman v. Kennedy Dry-Goods & Carpet Co., 79 Fed. 454;

Atwater v. Community Fuel Corp., 291 Fed. 686;

Jones v. Mutual Fidelity Co., 123 Fed. 506;

United States Radiator Corp. v. Doody, 5 F. Supp. 471;

McAtamney v. Commonwealth Hotel Construction Corp., 296 Fed. 500.

The test is likewise applied from the defendant's viewpoint in many of the cases brought by creditors of insolvent banks to enforce the statutory liability of stockholders. Representative decisions are:

Conway v. Owensboro Savings Bank & Trust Co., 185 Fed. 950;

Alsop v. Conway, (C.C.A. 6) 188 Fed. 568; writ of Certiorari denied in 223 U. S. 720, 56 L. Ed. 629, 32 S. Ct. 523;

Robertson v. Conway, (C.C.A. 6) 188 Fed. 579;

Brusselback v. Cago Corp., (C.C.A. 2) 85 F. (2d) 20; writ of Certiorari denied in 299 U. S. 586, 81 L. Ed. 432, 57 S. Ct. 111;

Brusselback v. Chicago Joint Stock Land Bank, (C.C.A. 7) 85 F. (2d) 617;

Brusselback v. Armovitz, (C.C.A. 6) 87 F. (2d) 761;

Reconstruction Finance Corp. v. Central Republic Trust Co., 11 F. Supp. 976;

The necessity of recognizing the rule contended for by appellant is obvious when the matter of counterclaim is considered. For instance, in *Celite Corporation v. Dicalite Co.*, (C.C.A. 9) 96 F. (2d) 242, this court was concerned with a suit for infringement of letters patent. The defendant filed a counterclaim seeking damages for unfair competition. Jurisdiction of the counterclaim was supported upon diversity of citizenship. The court found that more than \$3,00 was involved by the counterclaim and accordingly assumed jurisdiction.

This court had occasion to apply the test from the defendant's viewpoint in *Robert Hind, Limited v. Silva*, (C.C.A. 9), 75 Fed. (2d) 74. The issue was whether or not the action involved more than \$5,000, the amount necessary to confer jurisdiction on this court in civil cases on appeal from the Supreme Court of the Territory of Hawaii. The plaintiff had been injured in an automobile accident and had accepted a nominal sum in settlement and had given the operator of the vehicle a full release. Subsequently he regretted this and sued to set the release aside and to enjoin the operator of the vehicle from using the release as a defense in a second suit brought by plaintiff to recover damages in the sum of \$25,000. Plaintiff was successful in the trial court and the latter's decision was affirmed by the Supreme Court of the Territory of Hawaii. The defendant (operator of the vehicle) appealed to this court. The appellee moved to dismiss the appeal on the ground that the jurisdictional amount was not present, contending that the matter in controversy was \$84.50, the amount paid him for the release which he was seeking to set aside. The appellant contended that the matter in controversy was the value to it of the right to use the release as a defense in the \$25,000 damage action and that the value of this right exceeded \$5,000. This court reviewed the authorities including the decisions of the United States Supreme Court in *Hunt v. New York Cotton Exchange*, Supra, 205 U. S. 322, 51 L. Ed. 821, 27 S. Ct. 529 and *Mississippi and Missouri Railroad Co. v. Ward*, 2 Black 485, 67 U. S. 485, 17 L. Ed. 311 and

then quoted with approval the following statement of the rule from Foster on Federal Practice, (6 ed.), Vol. 1, Sec. 13:

"In a suit for an injunction, the value of the matter in dispute is that of the object of the bill, namely, the value to the plaintiff of the right for which he prays protection, *or the value, to the defendant, of the acts of which the plaintiff prays prevention.*"

(Italics ours.)

In applying the test *from the standpoint of the defendant* and holding that it had jurisdiction of the appeal, this court said:

"Clearly, the right of appellant to use the release as a complete defense to an action for \$25,000 damages exceeds \$5,000."

The rule contended for by appellant is supported by the text writers. In the 1942 Four-Year Cumulative Supplement to Moore's Federal Practice under the New Federal Rules, Volume 1, at page 553 we find the following statement:

"Nevertheless, in determining the amount in controversy, a court may look to the object sought to be accomplished by the action and the pecuniary result to either party which the judgment would directly produce. In accordance with this rule, jurisdiction of a removed cause has been sustained where the fact is, as shown by stipulation of the parties, that the granting of the relief sought by plaintiff would result in a loss of more than \$3,000.00 to defendant, although the benefit to plaintiff would not be in excess of \$2,000.00."

In Hughes on Federal Practice, Volume 1, Section 422, page 317, the rule is stated as follows:

"The value of the matter in controversy is the value of that which the complainant seeks

to recover or the value of that which the defendant will lose if the complainant obtains the recovery he seeks. It means the pecuniary result to either party which the judgment entered in the case would directly produce, either at once or in the future. It is the actual matter in dispute, the value of the rights involved that is controlling."

Again in Moore's Federal Practice under the New Federal Rules, Volume 1, page 525, we find the statement:

"In an action or proceeding to recover the possession of personal property, the value of the property sought by the plaintiff or claimant generally determines the matter in dispute."

The rule is stated as follows in 27 R.C.L. 116, Sec. 119:

"In those cases where the amount is jurisdictional, the pecuniary value of the matter in dispute may be determined not only by the money judgment prayed for, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed for *or by the pecuniary result to one of the parties* immediately from the judgment."

(Italics ours.)

In 36 C.J.S. 519, the following statement is made:

"The authorities have frequently asserted the rule that the amount or value involved in the controversy is measured by the pecuniary consequence to either party which the judgment will produce, according to the judicial decisions on the subject, either at once or in the future."

The rule thus established and recognized is simple and fair. It assures the courts of the protection intended for them and at the same time allows liti-

gants to determine substantial matters in a Federal forum. As long as the direct pecuniary consequence to either party exceeds the requisite amount, jurisdiction attaches.

First Matter in Controversy

Inasmuch as the District Court clearly has jurisdiction of the second matter in controversy—the creation of a trust in favor of Clarence B. Blethen II involving a large block of the stock—it likewise has jurisdiction of the first matter in controversy—the right of the trustees to control the stock in question during the period of the administration of the Blethen estate. The rule is well settled that where jurisdiction is acquired by reason of diverse citizenship, all of the issues in the case may, and in fact must, be determined.

Sun Oil v. Burford, (C.C.A. 5) 130 F. (2d) 10;
Iowa City v. Iowa City Power & Light Co.,
 (C.C.A. 8) 90 F. (2d) 679;

Hartford Accident Indemnity Co. v. Southern Pacific Co., 273 U. S. 207, 71 L. Ed. 612, 47 S. Ct. 357.

The Supreme Court of the United States said in *Owensboro Water Works Co. v. Owensboro*, 200 U. S. 38, 50 L. Ed. 361, 26 S. Ct. 249:

“When a Federal court acquires jurisdiction of a controversy by reason of diverse citizenship of the parties, then it may dispose of all of the issues in the case, determining the rights of parties under the same rules or principals that control when the case is in the State Court.”

But even standing alone this so-called “first matter in controversy” compels an exercise of the juris-

diction of the District Court; it, too, involves more than the jurisdictional amount.

By virtue of an assignment plaintiff stands in the shoes of the Ridder Brothers with respect to the contract and supplemental contract of December 30, 1929. Under these contracts, as appears from the terms thereof (they are set forth in full on pages 31 to 79 of the Transcript) and from the allegation of the complaint that Ridder Brothers complied with all the provisions thereof, in other words, did all that was required of them thereunder, the Ridder brothers invested \$1,541,970 in the Seattle Times newspaper enterprise. (Tr. 36) The Class B stock of Seattle Times Company, the voting stock, consists of 1,000 shares (Tr. 10). Under these agreements Mr. Blethen took 550 shares of this stock, and Ridder Brothers 440 shares. Ten shares were issued to Mr. Todd, Mr. Blethen's lawyer. Later Mr. Blethen transferred to Ridder Brothers, Incorporated, Ridder Brothers' assignee, 55 shares of this stock. During his lifetime Mr. Blethen transferred 455 shares of this stock to the Blethen Corporation, one share to his wife, Rae Kingsley Blethen, and retained in his own name 39 shares. There was also transferred to Ridder Brothers, Incorporated, in consideration for the investment aforesaid, 4,030 shares of the Preferred Stock and 14,000 shares of the Class A Common Stock of Seattle Times Company. (Tr. 10, 11) So the investment of \$1,541,970 by Ridder Brothers or their assignee in the Seattle Times newspaper enterprise gave to Ridder Brothers or their assignee a very substantial inter-

est in the enterprise. The Ridder brothers or their assignee acquired and had at the time of Mr. Blethen's death the Preferred and the Class A Stock referred to and 495 shares of the 1,000 shares of the voting or Class B common stock. (Tr. 11). Now, while Mr. Blethen lived, he and the Ridders were to operate the business together. This was provided by the provisions of the supplemental agreement; Mr. Blethen was to be president and publisher and that the Ridders were to participate in the management through a management contract. Upon Mr. Blethen's death, how were thing to be handled? This question Mr. Blethen and the Ridders answered by the supplemental agreement. (Tr. 56 to 79.) They contracted by this agreement that upon Mr. Blethen's death his Class B stock was to be transferred to three trustees, one of whom was to be one of the Ridder Brothers, and that in case of any difference or differences between the trustees, the same were to be settled by the then manager of the Associated Press. (Tr. 77). So, by virtue of the agreements in question, it was contracted that the Ridders upon the death of Mr. Blethen were to have outright control of 495 of the 1,000 shares of the voting stock, and a say as one of the three trustees as to the control of an additional 495 shares of this stock. In other words, the Ridders were in substance and effect given a voice with respect to 990 shares of the 1,000 shares of the voting and controlling stock of the company. By the arbitration provision of the supplemental agreement, the Ridder trustee, if dissatisfied with the conclusions of the other two trus-

tees as to anything connected with the management of the appellee Seattle Times Company, the business being the running, operation and publication of a newspaper, could have such difference or differences settled by the then General Manager of the Associated Press, who, by reason of his position and the experience which makes it possible for him to hold such a position, is peculiarly competent to settle the same. In other words, the supplemental agreement offered the Ridders, upon the death of Mr. Blethen, protection with respect to the investment aforesaid. The establishment of this protection is one of things appellant seeks in this law-suit. As we have said, the protection provided by the supplemental agreement amounts to nothing, if its operative effect is to be postponed for the duration of the probate of the Blethen estate. To be effective, the trust arrangement should be in operation now. So, what is the right which plaintiff, assignee of the Ridders, seeks to protect and enforce in this law-suit? It is the right to be put in position to protect an investment of more than a million and a half dollars. What is the right worth? Defendants will say that it cannot be valued. We say that under the decisions its value can be determined, and that such value is to be measured by the investment in question. The investment sought to be protected gives to this right a value in the amount thereof, namely, approximately \$1,500,000.

In support of what we say, see:

Black v. Jackson, 177 U. S. 349, 20 S. Ct. 648, 44 L. Ed. 801;

Arndt v. Bank of America, 48 Fed. Supp. 961;
Peterson v. Sucro, 93 F. (2d) 878, 114 A. L. R.
 890, (C.C.A. 4);
Trainor v. Mut. Life Ins. Co., 131 F. (2d) 895,
 (C.C.A. 7);
Beneficial Industrial Loan Corp. v. Kline, 132 F.
 (2d) 520 (C.C.A. 8);
Evenson v. Spaulding, 150 Fed. 517, (C.C.A. 9);
American Fisheries Co. v. Lennen, 118 Fed. 869,
 (C.C.D. Conn.);
Miles Laboratories v. Seignious, 30 F. Supp.
 549, (D.C., E.D., So. Car.);
Harrison v. Grandison Co., 34 F. Supp. 356,
 (D.C., E.D., La., New Orleans D.);

In the Beneficial Industrial Loan Corporation case, *Supra*, (132 F. (2d) 520), the law as announced is applicable in the situation before us. We quote from the opinion as follows:

“The matter in controversy here is the trade name in question and the sum in controversy is not alone the damage which is claimed to have been done by the defendants but is the value of the property interest in that trade name. In *Indian Territory Oil & Gas Co. v. Indian Territory Illuminating Oil Co.*, 10 Cir., 95 F. 2d 711, 713, where the defendant was restrained from using the words ‘Indian Territory’ as part of its name the court said:

“ ‘The test in determining the amount in controversy in a case of this kind presenting a continuing wrong to an established business growing out of unfair trade practices, is not the immediate pecuniary damages arising from the wrongful acts. It is the value of the business or the right to be protected; and business reputation or good will is an intangible asset to be taken into consideration in ascertaining the extent and value of the business or right. See *Bitterman v. Louisville & Nashville R.R. Co.*, 207 U. S. 205, 28 S. Ct. 91, 52 L. Ed.

171, 12 Ann. Cas. 693; *Standard Oil Co. of New Mexico v. Standard Oil Co. of California*, 10 Cir. 56 F. 2d 973.'

"In *Harvey v. American Coal Co.*, 7 Cir., 50 F. 2d 832, 834, a case involving unfair competition in the use of the name 'Pocahontas' by coal dealers, the court said: 'It is the good will—the right to the exclusive use of the name—which is endangered, and the bare statement of the facts conclusively indicates a value many times larger than the jurisdictional amount'."

In the *American Fisheries Company* case, *Supra* (118 Fed. 869), there is a statement pertinent here, and we quote the same:

"The fact that an actual injury resulting from the violation of a right is small, and the interest to be effected by an injunction is large, is not to weigh against the interposition of preventive power in equity when it is clear that on one hand a right is violated and on the other a wrong committed. *Railroad Co. v. McConnell* (C.C.) 82 Fed. 65. The value of the object to be gained by the bill is the criterion in each case. In the present inquiry the object to be gained is to prevent the defendants from continuing their connection, directly or indirectly, with the plant, equipment, and business of the *Manhaden Oil & Guano Company*. The evidence shows beyond peradventure that their actual cash interest therein, direct and indirect, through themselves and their families, is largely in excess of the jurisdictional amount. The salaries alone which they receive as the managing and controlling spirits are sufficient to furnish jurisdiction. The annual catch of fish, together with the oil and guano and scrap into which the fish are transmuted, are excessively ample. It would be idle and superfluous to state in concrete form that the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000."

In the Miles Laboratories case, Supra (30 F. Supp. 549), the court said:

"It is quite true that the plaintiff makes no attempt by pleading or proof to evaluate in money the damage to it by the five sales of Alka-Seltzer made by the defendant, each at a few cents under the so-called 'fair trade price.' Nor does the plaintiff contend that these five sales did cause monetary damage to it in excess of three thousand dollars. However, it is a firmly established principle of law that when a litigant seeks an injunction to protect a right, and shows that some invasion of that right has occurred, or been threatened, the test of the jurisdictional amount is the value of the right that is to be protected, and not the extent of the monetary loss or damage that has been suffered or is threatened by the invasion. The reasons for this rule are so obvious, and have been so frequently pointed out in the cases cited, that further discussion of them here can add nothing to what has previously been paid."

As strongly suggestive of the rule applicable in the situation before us, we refer to the cases of *Black v. Jackson*, 177 U. S. 349, 20 S. Ct. 648, 44 L. Ed. 801; and *Arndt v. Bank of America*, 48 F. Supp. 961 (D.C., N.D., Calif., S.D.).

In the Black case, plaintiff brought suit to enjoin interference with his possession of certain land. He had settled on the land under the homestead law, but had not yet received patent from the Government. Legal title to the land was in the Government. Plaintiff simply had possession. The claim was advanced by the defendant that the matter in controversy was the right of possession to the land, and that there was no showing as to the value of

this right; and that, as a consequence, the Federal Court was without jurisdiction. The Supreme Court refused to accept this view and held that the value of the land determined the amount in controversy. The court said:

“Although the naked legal title remains in the United States in trust for the person who may earn it, we think that in determining the value of the matter in dispute we should look at the value of the land, not simply at the value of the right of present possession. According to the weight of the proof, the value of the land embraced by the homestead entry of Black is more than the sum required for our jurisdiction.”

In the Arndt case the action was one to recover \$420 interest on a \$1,000 note and to cancel the trust deed which had been given to secure the note. The theory was that the transaction was usurious. Claim was made that the controversy involved only a note for \$1,000 secured by a deed of trust plus a monetary demand of \$420, or a total of less than \$3,000; and that, as a consequence, the court was without jurisdiction.

The Court held that the matter in controversy was the value of the land, saying:

“While not too clearly expressed in the complaint, it is obvious that the objective of plaintiffs is to remove, for the present and the future, what is now an encumbrance and cloud on the title of their farm property.”

The following taken from the opinion in this case is very pertinent:

“The Statute (28 U.S.C.A. § 41) requires the matter in controversy to exceed the sum or

value of \$3,000. It has long been unquestioned that a money demand is not the *sine qua non*. Here the complaint shows the matter in controversy to be the farmer plaintiffs' right of enjoyment of their farm property (alleged to be worth in excess of \$3,000) free of the impairment of the demand and claim of lien of defendants. *Frontera Transportation Co. v. Abaunza*, 5 Cir., 271 F. 199, is in point. In that case, cancellation of a mortgage (upon which \$600 was alleged to be due) was sought. The mortgaged property was alleged to be worth in excess of \$3,000. True, by answer the defendant alleged the amount of the mortgage debt to be in excess of \$3,000 and the lower court required a tender of \$5,000 by plaintiff as the amount necessary to satisfy the mortgage. The Circuit Court held that the defendants, having so answered, could not insist that the amount in controversy did not exceed \$3,000. In principle, however, the value of the property was recognized to be the basis for determination of the jurisdictional amount. The Court said:

"The suit in this case is not a suit to recover \$600, but to remove a cloud on the title to a piece of property. * * * Here a decree is sought to prevent the defendant from using his mortgage and these notes for any purpose, and to clear up the title to his entire property, which is alleged to be worth much more than \$3,000.' *Frontera v. Abaunza*, *supra*, 271 F. at page 201.

"See, also *Greenfield v. United States Mortgage Co.*, C. C., 133 F. 784. *Squire v. Robertson*, C. C., 191 F. 733."

So, in the matter before us, the suit, one with respect to the title, possession and control of certain stock, and one to eliminate defendants from such title, possession and control and to place the same in other parties involves the stock, and the

value thereof and the extent of the investment represented thereby is the thing that determines the amount in controversy.

Plaintiff seeks herein the right to protect its big investment in the manner and as provided by the supplemental contract aforesaid. This right is the right to participate in the voting of the majority of the voting stock, the Class B common stock, of appellee, Seattle Times Company, with the accompanying privilege of submitting any dispute between the designated trustees as to the management of Seattle Times Company to the manager of the Associated Press for final and conclusive decision. Obviously this right with this accompanying privilege is of great value to appellant, and appellant insists that such value is fixed by its investment, namely, \$1,541,970.

CONCLUSION

Whether or not the District Court has jurisdiction in this cause depends on the pecuniary result, viewed not alone from the point of view of the plaintiff but also from the point of view of the defendants. The lower court failed to apply this test. As to the first matter in controversy the thing involved is the protection of the investment by plaintiff of approximately \$1,500,000, and it is the contention of appellant that in view of this the first matter in controversy involves a sum or value far in excess

of \$3,000, exclusive of interest and costs. As to the second matter in controversy, the impression of a trust upon the stock in question in favor of Clarence B. Blethen II along with his three brothers, admittedly a sum far in excess of \$3,000 is involved. The lower court conceded this when it found:

“That the loss or detriment to defendants if plaintiff should prevail on the second matter in controversy, as referred to in paragraph 3 of the prayer of plaintiff’s complaint, exceeds in value the sum of \$3,000 exclusive of interest and costs.”

Success with respect to this second matter in controversy would mean in substance the taking of stock of the value of many thousands of dollars from the three brothers and transferring it to Clarence B. Blethen II. The lower court fell into error, in holding that it did not have jurisdiction of the cause because of lack of the jurisdictional amount, because of a refusal to apply to the matters in controversy, having particular reference to the second matter in controversy, the rule and test that it is the pecuniary result to either party to the litigation which determines whether or not the jurisdictional amount is involved.

As we have stated, if the requisite amount is involved in either matter in controversy, the lower court has jurisdiction for the purpose of disposing of the whole controversy.

We respectfully submit that the District Court

had jurisdiction and that it erred in entering the order dismissing the action; that the judgment appealed from, dismissing the action, should be reversed and the cause remanded with instructions to accept jurisdiction of both matters in controversy.

Respectfully submitted.

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IN THE
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FOR THE NINTH CIRCUIT

RIDDER BROTHERS, Incorporated, a corporation,
Appellant.

vs.

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BLETHEN; THE BLETHEN CORPORATION, a Corpora-
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Appellees.

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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**IN THE
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RIDDER BROTHERS, Incorporated, a corporation,

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Appellees.

No. 10504

UPON APPEAL FROM THE DISTRICT COURT OF THE
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WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant in its brief has set forth an accurate statement of the case. Normally under the rules of this Court we would not attempt to duplicate that statement here. We do so in this instance for two reasons only. In the first place the facts are somewhat complex, and it occurs to us that it may be of service to the members of this Court who read this

brief to have before them an account of the facts in the same volume as that which contains appellees' argument, so as to avoid any necessity of having to refer to the appellant's brief for that purpose.

In the second place, while the parties are on common ground as to the facts, the manner in which the same are presented and emphasized necessarily differs to some extent, and we feel that the Court might have a clearer understanding of the appellees' position if the facts were made available to the Court in the appellees' language.

This is an action for specific performance of a written contract. The contract in question was one made on December 30, 1929, between Clarence B. Blethen, now deceased, who will hereinafter be referred to, for purposes of brevity, as Blethen, Sr., and Bernard H. Ridder, Joseph E. Ridder and Victor Ridder, as co-partners. This contract was amended subsequently, and all reference hereinafter made to it deal with the contract in its amended form.

The suit is brought by a corporation, Ridder Brothers, Incorporated, which is the successor in interest to the Ridder copartnership. The defendants in this suit are the three executors of the estate of Blethen, Sr., one of whom is the widow of Blethen, Sr., the four sons of Blethen, Sr., the surviving widow in her individual capacity, and two corporations, The Blethen Corporation, and the Seattle Times Company.

The contract of December 30, 1929, which forms the basis of this suit, was one of several documents executed in connection with a rather elaborate plan

under which the ownership of the newspaper known as the Seattle Times was substantially changed in the latter part of 1929 and the early part of 1930. These contracts are set forth as Exhibits A to G to plaintiff's complaint and appear in the Transcript, pages 31 to 79. The contract of December 30, 1929, is Exhibit D, commencing on page 56 of the Transcript. Exhibits E, F and G are the amendments to Exhibit D.

The nature of the reorganization which took place in the ownership of the newspaper at that time need, for the purpose of this litigation, be described only in a general way. Prior to this reorganization the newspaper had been owned by a Nevada corporation called Seattle Times, Incorporated. The stock of this corporation was owned by Blethen, Sr. and other members of his family. As a result of the reorganization a new corporation, known as Seattle Times Company, was organized under the laws of Delaware, and the stock of this corporation, controlling the newspaper and its operations, was acquired by Blethen, Sr. and the copartnership of the Ridder Brothers. In other words, the members of the Blethen family, other than Blethen, Sr., sold all of their interest in the newspaper and the Ridder Brothers came in as part owners of the enterprise along with Blethen, Sr.

The new corporation, Seattle Times Company, issued preferred stock and two classes of common stock designated as Class A and Class B common respectively. It is the appellees' position that we are interested in this case solely in the Class B common stock. That stock possesses the sole voting power in the corporation unless dividends on the preferred stock are

in arrears, a condition which does not now exist, and is of no importance upon this appeal.

The total number of shares of the Class B common stock of Seattle Times Company is 1,000. As a part of the plan for reorganization it was agreed between Blethen, Sr. and the Ridder Brothers that Blethen should acquire 560 shares of the Class B stock (Tr. 35) and the Ridder Brothers should acquire the remaining 440 shares (Tr. 36). Obviously this contemplated the practical result that Blethen, Sr. should control a majority of the stock possessing the voting power of the corporation. This agreement was carried out and the Ridder Brothers did receive their 440 shares of Class B stock. Blethen, Sr. actually took 550 shares and Elmer E. Todd received the remaining 10 shares to which Blethen was entitled (Tr. 10). Subsequently Ridder Brothers, the copartnership, formed a corporation which took over all of the 440 shares of the partnership (Tr. 10, 11). This corporation, as the present owner of these shares, is the appellant here and plaintiff in the court below. Blethen, Sr. likewise formed a corporation, to which he transferred 455 shares of the Class B stock out of his block of 550 shares (Tr. 11). The formation of both these corporations and the transfer of these amounts of stock to them was agreed to by both the Ridders and Blethen (Tr. 59, 77). In the case of Blethen's corporation it was required that he personally retain ownership of 60% of the stock of his corporation, the name of which is The Blethen Corporation (Tr. 77). Blethen, Sr. at all times did hold this percentage of

the stock and the necessary amount is still held by his executors (Tr. 17).

By further agreement between Blethen, Sr. and the Ridders, Blethen transferred to Ridder Brothers, Incorporated, the appellant here, 40 of the shares of the Class B stock originally acquired by him (Tr. 11). Blethen also transferred 1 of the shares of this stock to his wife, Rae Kingsley Blethen, who is one of the appellees here both as executrix and in her individual capacity (Tr. 11). Blethen, Sr. personally retained 39 of the shares of the Class B stock (Tr. 11). Thus, as matters stood at the time of the death of Blethen, Sr. in the autumn of 1941, the 1,000 shares of Class B common stock were held as follows:

Ridder Brothers, Incorporated	495 shares;
The Blethen Corporation	455 shares;
Blethen, Sr.	39 shares;
Rae Kingsley Blethen, the wife of Blethen, Sr.	1 share;
Elmer E. Todd	10 shares.

To state the nature of this ownership in somewhat different form, the appellant owned 495 shares, the Blethen interests in the aggregate a like 495 shares, and the remaining 10 shares were held by Elmer E. Todd, in what might be called the balance of power.

Blethen, Sr. died on October 30, 1941, and thereafter his will, executed on December 4, 1940, was admitted to probate in King County, Washington (Tr. 16, 17). This litigation is entirely concerned with appellant's contention that this will violates the provisions of the eighth paragraph of the contract of December 30, 1929, as amended by further agreement dated June 30, 1930 (Tr. 76, 77). It is neces-

sary, therefore, to consider the terms of this paragraph of the contract, and the provisions of the will which was admitted to probate.

Paragraph 8 of the contract as amended reads as follows:

“Eighth: Blethen agrees, immediately after the issuance of Class B common stock to him, to make a last Will and Testament, or some other instrument in writing, which will provide in effect that his Class B common stock be held in trust by his trustees after his death for a period of twenty-one (21) years from December 30, 1929. Such last Will and Testament or other trust instrument shall also provide that Blethen’s Class B common stock shall not be sold by his trustees until the termination of such trust. Such last Will and Testament or other trust instrument shall constitute, nominate and appoint the widow of said Blethen as one of the trustees, Bernard H. Ridder, another of such trustees, and Elmer E. Todd, the third of such trustees. It shall further provide that, in the event of the death, resignation or disability of his widow at any time, the vacancy caused thereby shall not be filled but the surviving trustees shall act. In the event of the death, resignation or disability of Bernard H. Ridder at any time, one of his brothers shall act as trustee in his place and stead, and in the event of the death, resignation or disability of Elmer E. Todd at any time, one of the partners of the law firm now representing Blethen shall act as trustee in his place and stead. Such last Will and Testament or other trust instrument shall also provide that upon the termination of the trust, Blethen’s Class B common stock shall

be distributed by the trustees among the surviving sons of said Blethen and the issue of such of them as may be deceased, in equal shares, per stirpes. Such last Will and Testament, or other trust instrument, shall further provide that, in case of any difference or differences of opinion between the said trustees as to any question connected with the management of the corporation, the Class B common stock of which is to constitute the corpus of the trust, any trustee may submit such a question for arbitration, upon notice to the other trustees, to the then general manager of The Associated Press, and in any such case the decision of the said then general manager of The Associated Press shall be final and conclusive and be binding upon all of said trustees. Provided, however, that if said Blethen transfers, to a holding corporation to be formed by him, any of his Class B common stock in Seattle Times Company, a Delaware corporation (not less, in any event, than fifty-one (51) per cent of such stock at any time issued and outstanding), as permitted by the Fifth paragraph of the agreement of December 30, 1929, as herein modified, his last Will and Testament shall contain suitable provisions that not less than sixty (60) per cent of the voting stock of such holding corporation shall pass to the trustees above named, to be held in trust for the same period and under the same terms and conditions hereinabove provided."

There are just four points in this paragraph 8 which are of any importance on this appeal.

First, Blethen, Sr.'s agreement to make a last will and testament, or some other instrument in writing,

providing that his Class B common stock be held in trust by his trustees after his death for a period of 21 years from December 30, 1929, that is, until December 30, 1950.

Second. That the original trustees should be the widow of said Blethen, Sr., Bernard H. Ridder or one of his brothers as his successor, and Elmer E. Todd or one of the members of the law firm representing Blethen, Sr. as his successor.

Third. That the will, or other trust instrument, should provide that upon termination of the trust the Class B stock should be distributed by the trustees among Blethen's surviving sons, and the issue of such of them as may be deceased, in equal shares per stirpes.

Fourth. That in the event of any difference of opinion between the trustees as to the management of the Seattle Times Company, any trustee might submit such question to the then general manager of the Associated Press for arbitration, and the decision of the latter would be binding.

The appellant asserts that the will of Blethen, Sr. breached the terms of this portion of the contract of December 30, 1929, in two particulars. In the first place this will designated the three executors, defendants in the court below and appellees here, as the persons who should vote the stock of The Blethen Corporation, which in turn controlled the greater portion of Blethen's Class B common stock, and also should vote the Class B common stock owned outright by Blethen, during the period while Blethen,

Sr.'s estate was in the course of administration. The three executors are different persons from the three trustees designated in paragraph 8 of the agreement of December 30, 1929, as amended (Tr. 76, 77), except for the fact that the surviving widow is named both as executrix and trustee. It is the contention of the appellant that the three trustees named in the agreement of December 30, 1929, should have the right to vote the stock during the period of probate, and that Blethen broke his contract by vesting that power in the executors. It must be kept in mind that Blethen, Sr. did set up a trust in his will under which the three trustees named in the contract of December 30, 1929, will become entitled to hold and vote the stock after probate of the estate is completed. The first breach claimed is therefore confined to the period of probate of Blethen, Sr.'s estate.

The second breach claimed by appellant rests in the fact that Blethen, Sr. in his will disinherited one of his sons, whose name is Clarence B. Blethen II. This was done simply by a provision in the will under which, at the expiration of the trust, the stock held by the trustees is to be distributed to three named sons of Blethen, Sr., other than Clarence B. Blethen II.

We have, then, arising out of the complex maze of documents, two separate and distinct matters in controversy. The first is, did Blethen, Sr. breach his contract by vesting voting power in his executors rather than his trustees *during the period of probate of his estate?*

The second is, did Blethen, Sr. breach his contract by disinheriting one of his sons?

The appellant, asserting that both such breaches exist, seeks a decree under which the trustees would be given the voting power during probate, and the trust would be reformed so as to permit Clarence B. Blethen II to share equally with his brothers in the trust assets upon the termination of the trust.

The appellees moved to dismiss the action in the District Court upon the ground that the necessary jurisdictional amount of Three Thousand Dollars was not involved (Tr. 80, 81). This motion was sustained by the District Court and judgment of dismissal entered thereon (Tr. 84, 85). In support of their motion the appellees maintained the following propositions in the District Court, which are precisely the same as those maintained on this appeal:

1. That as to the first matter in controversy the complaint did not state a cause of action, and therefore could not possibly involve the jurisdictional amount. The ground for this contention was that under the laws of the State of Washington, the right to vote the stock of a decedent dying testate passes to his executors as a matter of law, and consequently that no provision in a will or elsewhere, which would vest in trustees the power to vote corporate stock of the decedent during probate, would be valid.

2. That even if it might be assumed, for the sake of argument, that Blethen, Sr. legally could have placed the voting power in the hands of the trustees during probate, nevertheless any right of the plaintiff to have the stock voted by the trustees is not susceptible of valuation in terms of money, and consequent-

ly no controversy is thereby presented which involves the jurisdictional amount.

3. That as to the second matter in controversy no cause of action is stated, and consequently no amount whatsoever is involved, because the right to maintain a suit to establish a trust in favor of Clarence B. Blethen II, is vested solely in Clarence B. Blethen II, and not in the plaintiff.

4. That even if the plaintiff possessed some technical right to maintain a suit on the second matter in controversy, the value of that right to the plaintiff would be nominal only, that the jurisdictional amount is to be tested by the value *to the plaintiff* of the right asserted, and that such value in this instance could not possibly reach the jurisdictional amount.

In the District Court the question of whether the trustees or the executors should have the voting power was identified as the first matter in controversy, and the question of the rights of Clarence B. Blethen II to share in his father's estate was identified as the second matter in controversy. These questions have been likewise so identified in the appellant's brief in this Court, and to avoid confusion we will employ the same identification here. The appellant has, however, in its brief relied upon the second matter in controversy as its major point to uphold jurisdiction, and has discussed that matter as its first point in its brief. Again we shall follow the appellant's lead and treat the second matter in controversy first.

ARGUMENT

THE COMPLAINT STATES NO CAUSE OF ACTION WITH RESPECT TO THE SECOND MATTER IN CONTROVERSY, AND CONSEQUENTLY THE JURISDICTIONAL AMOUNT DOES NOT EXIST WITH RESPECT TO THAT MATTER.

It is obvious that if no cause of action is stated with respect to a particular matter in controversy, such matter cannot possibly involve the jurisdictional amount. The value of such a matter in controversy is clearly zero, and not the necessary jurisdictional amount of \$3,000.00, or any part thereof.

The appellees maintain that the appellant's complaint states no cause of action upon the second matter in controversy, that is, the alleged right of Clarence B. Blethen II to share with his brothers in the ownership of the corporate stock upon the termination of the trust, because if such a right does exist, it can be enforced only in a suit brought by Clarence B. Blethen II himself, and not in a suit brought by the appellant corporation.

Clearly the provision in the contract relative to the ultimate distribution of the stock upon termination of the trust can be of real interest only to the Blethen family, and particularly to Clarence B. Blethen II, who, under the will, was eliminated from participation in the trust assets. The appellant, Rider Brothers, Incorporated, will not be one cent better or worse off whether Clarence B. Blethen II should ultimately share in the trust assets or not.

Upon the distribution of the trust assets, whether such distribution be made to three of the four sons of Blethen, Sr., or to all of them, the distributees will be free to do with the stock exactly as each of them sees fit. The only connection that the appellant corporation has with this particular provision is that its predecessor, the Ridder Brothers copartnership, happened to be a party to the contract in which the provision was set forth.

The contract, insofar as this matter in controversy is concerned, was, then, viewed from an angle most favorable to the appellant, one made between the Ridder Brothers copartnership and Blethen, Sr. for the benefit of third party beneficiaries, namely, Blethen's sons, including Clarence Blethen II.

It is now familiar law that there are three kinds of beneficiary contracts, (1) creditor beneficiary, (2) incidental beneficiary, and (3) donee beneficiary.

The complaint is barren of any allegation that there is now, or ever was, any creditor-debtor relationship between the Ridder Brothers copartnership and Clarence Blethen II. Hence Clarence Blethen II is not a creditor beneficiary and appellant does not claim that he is. If he is not a creditor beneficiary he must be either an incidental beneficiary or donee beneficiary. It is the firm view of appellees that the sons of Blethen, Sr., including Clarence Blethen II, were only incidental beneficiaries under the contract, because it was not the purpose of the two contracting parties in making their agreement with respect to

the stock to make financial provision for the sons at the termination of the trust period.

We make no issue before this Court, however, as to whether or not Blethen's sons were incidental beneficiaries. Suffice it to say, for the sake of this argument, that appellant *does not* and *would not* claim that Clarence Blethen II was an incidental beneficiary. He must then, according to appellant's view, be a donee beneficiary. From what has just been said, it is apparent that appellees emphatically deny that such is the fact.

Again that issue, however, need not be determined by this Court because, assuming for the sake of argument, and for the sake of argument only, that Clarence Blethen II is a donee beneficiary, nevertheless, under the law of the State of Washington the promisee in a contract has no right of action to enforce the provision of the contract which benefits the donee beneficiary.

It is true that the holdings of the American courts as to the right of a promisee to sue to establish the right or rights of a donee beneficiary are conflicting. Parenthetically, it may be said that even in those jurisdictions where the promisee is permitted to sue, the courts of those jurisdictions declare with one voice that the promisee's right to sue is "purely technical because breach of the promise causes him (the promisee) *no pecuniary damage*." Williston on Contracts, Vol. 2, Revised Ed., Sec. 390.

When, however, we endeavor to determine whether the promisee can maintain a suit at all, the courts

speak with a voice diverse. In Volume 17 C.J.S., page 1140, it is said:

“It has been held generally that one in whose name a contract is made for the benefit of another may sue on it in his own name, even when an action might be maintained by the other, the code provisions in some of the states expressly permitting the promisee to sue in his own name without joining the beneficiary. However, in a jurisdiction where the real party in interest is required to sue, it has been held that the action *must be brought* by the *beneficiary* and *not* by the party *in whose name the contract was made.*”

A more complete statement of this divergence of opinion can be found in Williston on Contracts, Vol. 2, Revised Ed., Section 390.

But it is not at all material here to determine which of these divergent views are correct, for, as the encyclopedia writer just quoted says, there are jurisdictions where “the action *must be brought* by the *beneficiary* and *not* by the party in whose name the contract was made.” And the writer cites in support of the foregoing statement the case of *MacGerry v. Rodgers*, 144 Wash. 375, 258 Pac. 314. In that action a woman sued upon a contract, alleging that the defendants agreed, for a valid consideration, to support her and her child for the remainder of defendants’ lives. Clearly, after the child reached the age of majority, such a contract would be solely for the benefit of the child as donee beneficiary. Under these circumstances the court held that the plaintiff mother, as promisee, could not in her action recover on the contract insofar as it affected the rights of the child after attaining the

age of majority, saying that it should be left to "the child to recover, if it might, for the loss of the benefits, if any, which might be expected to accrue to it under the alleged contract after the age of dependency had passed."

Now, making the assumption that Clarence Blethen II is a donee beneficiary, the *MacGerry* case and this case are absolutely indistinguishable. The contract in the *MacGerry* case was made between the defendants and the mother, the child not being a party. The contract here was made between Clarence Blethen, Sr. and the predecessors of appellant, no one of the sons of Blethen, Sr. being a party. In the *MacGerry* case, so far as benefits to accrue to the child after majority were concerned, the contract was made entirely for the benefit of the child, who was not a party to the contract itself. In this case the contract, so far as Clarence Blethen II was concerned, was made entirely for his benefit and he was not a party to the actual contract itself. In each case the contract is not of any benefit to the promisee, who was a party to the contract.

The decision in the *MacGerry* case has the support of common sense. The only real party in interest in the donee beneficiary contract is the donee beneficiary. If the real party in interest can sue, why should the promisee, who has no real interest and whose recovery, even in those jurisdictions which permit the promisee to sue, would be only nominal damages, be allowed to sue? If a promisee is allowed to sue, we not only have the promisor exposed unnecessarily to two suits based on the same subject matter but maintained by different parties, but also we have the distinct possibility

that the promisee may maintain the action in a manner utterly contrary to the wishes of the beneficiary, who alone is vitally interested in the suit. Be that as it may, the principle announced in the *MacGerry* case settles the question in the State of Washington and announces a ruling binding upon the Federal Courts.

THE JURISDICTIONAL AMOUNT IS TO BE TESTED BY THE VALUE OF THE RIGHT TO THE PLAINTIFF. ANY RIGHT WHICH PLAINTIFF MAY HAVE ON THE SECOND MATTER IN CONTROVERSY IS OF NOMINAL VALUE ONLY AND FAR LESS THAN THE JURISDICTIONAL AMOUNT.

In seeking to support the jurisdiction of the District Court, appellant devotes its major and primary argument to the proposition that jurisdiction exists because, if appellant should prevail on the second matter in controversy, certain of the defendants would lose more than \$3,000. This argument necessarily assumes first, that a cause of action is stated with respect to the second matter in controversy, and second, that jurisdictional amount can properly be tested by viewing the controversy from the standpoint of the defendant.

The appellees have already in this brief demonstrated that the first of these assumptions is erroneous and that jurisdiction does not exist on the second matter in controversy because no cause of action exists in plaintiff's favor thereon. Notwithstanding that and assuming, however, only for the purpose of meeting appellant's argument, that a cause of action is stated on the second matter in controversy, appel-

lees assert that jurisdiction cannot be tested by what appellees or any of them stand to lose, *but only by the value of the right to the plaintiff.*

The parties are in complete agreement upon the factual proposition that the plaintiff corporation does not stand to gain anything under the second matter in controversy, but that three of the defendants, Francis A. Blethen, William K. Blethen and John Alden Blethen would lose more than \$3,000 if their brother, Clarence B. Blethen II, should take a one-quarter interest in the trust property. The point now under discussion, therefore, squarely raises the question of whether jurisdiction is to be tested by the value of the right to the plaintiff or whether it may, in the alternative, be based upon loss to the defendants in excess of the jurisdictional amount. These alternative tests have been referred to by the commentators as the plaintiff viewpoint and defendant viewpoint rules and will hereafter be so described in this brief.

The appellees concede that many statements can be found in the decisions of the District Courts and the Circuit Courts of Appeals which would appear to support the defendant viewpoint rule as an alternative test of jurisdiction. Appellees, however, maintain that the Supreme Court of the United States is now firmly committed to the plaintiff viewpoint rule as the sole test for determining the existence of the jurisdictional amount, and that the statements contained in the decisions of the lower federal courts originate in dictum and do not announce the true rule.

It is readily apparent that in the overwhelming majority of cases, the problem is purely academic. Ordinarily the possible gain to the plaintiff and the possible loss to the defendant are identical amounts. Thus the application of either the plaintiff viewpoint or defendant viewpoint rule will in such cases lead to the same result. Consequently, the lower federal courts in expressing the formula for determining jurisdiction have stated that the test may be made alternately from the viewpoint of plaintiff or defendant, when in fact no occasion existed to consider the matter from any alternate standpoint. However, it must be kept in mind that under such circumstances neither counsel nor the court had their attention directed to the somewhat unique situations, like that in the case at bar, when the values as tested from opposite viewpoints would radically differ. Any statement contained in a decision which was unnecessary to the ultimate ruling made, is, of course, not binding as a precedent, but often is unhappily taken as a reasoned proposition in subsequent litigation when the point is vital. The appellees maintain that this is precisely what has occurred to some extent in the lower federal courts on the point here under discussion, and oppose the perpetuation of the erroneous defendant viewpoint rule here.

The leading case thought to support the defendant viewpoint rule is *Cowell v. City Water Supply Company*, 121 Fed. 53, a decision of the Circuit Court of Appeals for the Eighth Circuit rendered in 1903. In that case the plaintiff had been the owner of a \$1,000 bond issued by the Iowa Water Company.

The bond issue being in default, a bondholders' committee was formed to which plaintiff and the other bondholders surrendered their bonds. The committee foreclosed the underlying mortgage and acquired the property. Then the committee formed a new corporation to which this property was transferred and the new corporation placed new mortgages on the property in the aggregate principal amount of \$475,000. The plaintiff alleged that these proceedings by the bondholders' committee and the new corporation subsequent to foreclosure of the mortgage securing the bonds were unlawful and in violation of his rights. He further alleged that the value of the property was \$525,000 and he sought to have the mortgage canceled upon behalf of himself and all others similarly situated. Plaintiff himself claimed only a $\frac{1}{325}$ th interest in the property. Applying this fraction to the whole value of the property resulted in a sum less than the jurisdictional amount. The court held that, if plaintiff should prevail, only his interest would be involved and that the only decree that could be entered was one affecting plaintiff's $\frac{1}{325}$ th interest in the property. Consequently jurisdiction was denied because this interest did not have a value in excess of the jurisdictional amount. In the view adopted by the court the value to the plaintiff and the loss to the defendant would be one and the same. In arriving at its decision the court reviewed a number of authorities and concluded with the statement:

“Perhaps these cases sufficiently illustrate and establish the rule that it is the amount or

value of that which the complainant claims to recover, or the sum or value of that which the defendant will lose if the complainant succeeds in his suit, that constitutes the jurisdictional sum or value of the matter in dispute, which tests the jurisdiction of the Circuit Courts of the United States."

A critical analysis of this statement, which is the major source relied on for the defendant viewpoint rule, develops several points. Of these appellees make the following:

1. As already noted, the value to the plaintiff and the loss to the defendant in the *Cowell* case were one and the same. The alternative plaintiff or defendant viewpoint test was therefore of no moment in arriving at the decision.
2. The court states that "perhaps" the authorities, which it reviews, establish the rule announced. We categorically assert that there is not a single decision cited in the *Cowell* case, which contains any language which is comparable to that above quoted from the *Cowell* case or contains anything from which the defendant viewpoint rule can be deduced, except the case of *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. ed. 895, which we shall shortly discuss.

Space does not permit nor does necessity require an analysis of all of the decisions cited in the *Cowell* case. In addition to pointing out generally that none of those cases, with the possible exception of *Smith v. Adams*, affords any foundation for language indicating approval of the defendant viewpoint rule, we assert that the substance of some of the decisions cited in the *Cowell* case supports the plaintiff viewpoint rule exclusively.

Thus in *Miller v. Clark*, 138 U. S. 223, 11 Sup. Ct. 300, 34 L. ed. 966, plaintiff claimed a 1/6th interest in an estate and sued to prevent the executor from delivering three bank deposit books evidencing total deposits of over \$5,000 to three persons in whose names they stood. These three persons were also named as defendants. Obviously they stood to lose more than the jurisdictional amount of \$5,000 which then measured the jurisdiction of the Supreme Court of the United States under a statute virtually identical with the present jurisdictional statute for the District Courts. Jurisdiction of the Supreme Court was challenged by the defendants on the ground that none of the passbooks claimed by each of the three defendants had a value of \$5,000. This challenge clearly approached the problem from the viewpoint of the defendants. The court, however, in denying jurisdiction did so solely because jurisdiction did not exist from plaintiff's viewpoint. In so doing the court said:

"We are of the opinion that the appeal must be dismissed, *on the ground that the interest of the plaintiff* does not exceed \$5,000. As the total amount involved is only \$5377.83, and the interest of the plaintiff in that sum is, under the will, only one-sixth thereof, or \$896.30 $\frac{1}{2}$, this court has no jurisdiction of her appeal."

Under appellant's theory, the Supreme Court could not have disposed of the case simply by this comment on the value of the plaintiff's interest. It would of necessity have been compelled to then view the matter from the standpoint of defendants and decide whether jurisdiction could rest on their possible loss.

That it did not do so is the clearest indication that the Supreme Court regarded the plaintiff viewpoint rule as the sole test.

Bruce v. Manchester & Keene Railroad, 117 U. S. 514, 6 Sup. Ct. 849, 29 L. ed. 990, is of like import. There two bondholders brought an action to foreclose a \$500,000 mortgage securing a bond issue. The aggregate claims of the two bondholders was \$3400. The court held that the latter figure was the sole test of its jurisdiction and being less than \$5,000 could not support jurisdiction. The court pointed out that the litigation could be concluded at any time by payment to plaintiffs of the amount of their claims. It recognized that if such payment were not made, the result might be foreclosure of the entire \$500,000 mortgage, but regarded that as purely incidental. Certainly the latter figure represented the "sum or value of that which the defendant will lose if the complainant succeeds in his suit" (the exact language of the *Cowell* case) but that circumstance was clearly not regarded as important by the court.

Werner v. Murphy, 60 Fed. 769, decided by the Circuit Court of New Jersey, is another of the decisions relied upon in the *Cowell* case. There the plaintiff's claim amounted to \$1489.33 and he sought to set aside fraudulent conveyances to property worth vastly in excess of the jurisdictional amount. Clearly the defendants who had received these conveyances stood to lose more than the jurisdictional amount, but the court held that jurisdiction was to be measured solely by plaintiff's claim and that being insufficient, jurisdiction was denied.

Without reviewing all of the cases cited in the *Cowell* case, we submit the foregoing to show how unwarranted was the quoted statement of the Circuit Court of Appeals in that decision.

As already indicated, the only decision cited in the *Cowell* case which in any way supports the portion we have quoted therefrom is *Smith v. Adams*, 130 U.S. 167, 9 Sup. Ct. 566, 32 L. ed. 895.

In that case there was again involved the question of the then jurisdictional amount of \$5,000 for appeals to the Supreme Court. The controversy essentially was one between a taxpayer and a county over a change of location of the County seat. The county commissioners, trying to appeal from an adverse decision, contended that jurisdiction existed because the city in which the new county seat was to be located had given the county a tract of land, which the county might lose if the plaintiff succeeded in his challenge to the validity of the election changing the location of the county seat. The value of this property was said to be more than \$5,000.

The actual decision of the court was based on the narrow point that the loss of this property was not the matter in dispute but merely a collateral incident thereto. The exact language of the court in reaching this conclusion is:

“The acquisition or loss of the land in question is not a necessary consequence of the election for the county seat, such result not being created by law, but by a mere accident arising from a voluntary gift by Aberdeen, made contingent on the removal of the county seat to that place and its continuance there.”

Thus the court held that since this factor was irrelevant to valuation of the matter in dispute, and there was nothing else to indicate the jurisdictional value, jurisdiction should be denied. In discussing the problem of jurisdiction, the court makes the following statements which possibly lean in the direction of a defendant viewpoint rule:

"It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment."

* * * * *

"Not doubting the correctness of the doctrine thus stated, we do not perceive how it can help the appellants. It is true they represent the county, but it is impossible to state any rule, by which the benefit the county may gain, or the damage it may suffer from the result of the election contested, can be estimated."

In the first of these statements the court mentions "pecuniary result to one of the parties" and in the second it mentions "gain" or "damage" to the county. It does not, however, appear that any question of the plaintiff viewpoint versus defendant viewpoint rule was argued to the court. The court said that the rules it announced were "conceded." What the court obviously had in mind was its ultimate holding of no jurisdiction, because the only matter sought to be valued was a collateral rather than a direct and immediate consequence of the litigation.

In view of its ultimate holding and informal approach, we do not believe *Smith v. Adams* was ever intended to be an outright adoption of the defendant viewpoint theory. Even if it were so intended, we are entirely confident that such is not the view of the modern Supreme Court cases upon which we rely and to which we shall in due course refer.

Reverting to the *Cowell* case, appellees concede that the language which we have quoted from that decision has been quoted in a considerable number of cases in the lower federal courts in the last forty years. It is a singular circumstance that the *Cowell* case has never been quoted or even cited by the Supreme Court of the United States. Neither has that court, since the decision in the *Cowell* case, used any language which would lend support to the theory that it recognized the defendant viewpoint rule. On the contrary, as we shall demonstrate at a slightly later point in this brief, the expressions of the Supreme Court of the United States all point to adherence to the plaintiff viewpoint rule exclusively.

It is equally singular that the lower federal courts have so frequently adopted the quotation in the *Cowell* case as the leading authority expressing the rules by which jurisdiction is tested, and have shown, in so doing a complete lack of interest in the expressions of the Supreme Court of the United States upon that subject.

So far as an extended investigation on our part has been able to develop, the repetition by the lower federal courts of the language of the *Cowell* case is, in all instances subsequent to the decision of that case

in 1903, nothing more than dictum except in two decisions. In all of the decisions except these two the amount which the plaintiff stood to gain or the defendant stood to lose was precisely the same, and consequently jurisdiction would or would not exist in those cases by applying the plaintiff viewpoint rule only.

The two instances in which the *Cowell* case has been relied upon to apply the defendant viewpoint rule, so as to sustain jurisdiction in circumstances where the value of plaintiff's right did not equal the jurisdictional amount, are *Ronzio v. Denver & Rio Grande R. R.*, 116 F.(2d) 605, a decision of the Circuit Court of Appeals for the Tenth Circuit, and *Armstrong v. Townsend*, 8 F. Supp. 953, a decision of the District Court of Indiana.

Neither of these decisions makes any critical analysis into the sources of the rule in the *Cowell* case. In both decisions it is simply assumed that jurisdiction can be tested in the alternative from the viewpoint of the plaintiff or of the defendant. This same lack of critical analysis is, it may be noted, common to all of the decisions resting on the language of the *Cowell* case.

There are occasional decisions to be found which invoke the decision of the Supreme Court of the United States in *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black 772, as an authority for the defendant viewpoint rule. This case is an even frailer reed upon which to base the defendant viewpoint doctrine than is the *Cowell* case, but being a decision of the Supreme Court of the United States, merits attention in the

consideration of this problem. The *Ward* case was decided in 1862. It was an action brought by the part owner of three steamboats, seeking the abatement of a bridge across the Mississippi River, on the ground that it constituted a nuisance. It is highly questionable that jurisdictional amount was in dispute in this case. The court starts by saying. "It is insisted that Ward cannot sue alone and could only come before the court jointly with the other part owners of the vessels injured and delayed." The court then enters upon a paragraph of discussion entirely devoted to the right of Ward to maintain his suit for abatement of nuisance without joining the co-owners of the boats. However, in the last sentence, with no previous indication that the subject of jurisdictional amount is in question, the court says:

"But the want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern."

This language has been quoted as being in some way indicative of support of the defendant viewpoint rule. We are confident that anyone who will read the *Ward* case, without preconceived notions on the subject, will come immediately to three conclusions. One is that it is doubtful if the court by this single sentence, included in a discussion of an entirely different problem, intended to lay down any hard and fast rule with respect to jurisdictional amount. Second, that if such was the intention, the problem was by no means care-

fully considered. Third, that the single sentence above quoted is highly ambiguous.

Just what did the court mean by the word "object" in the final clause of the sentence? The only way to render the statement in the *Ward* case intelligible is to interpolate into the quotation, after the word "object," the words "to be gained." This is precisely what was done by the Supreme Court of the United States in *Hunt v. New York Cotton Exchange*, 205 U.S. 322, 27 Sup. Ct. 529, 51 L. ed. 821, where, in speaking of the *Ward* case, the court said:

"In *Mississippi & Missouri Railroad Company v. Ward*, 2 Black 485, it was decided that jurisdiction is to be tested by the value of the object to be gained by the bill."

Such an interpretation of the language of the *Ward* case, which is the only reasonable interpretation, constitutes clearly an adoption of the plaintiff viewpoint rule. Jurisdiction is to be measured by the value of the object *to be gained*, not by what anyone will lose. Naturally the person who is to gain something is the plaintiff, and it is from his viewpoint alone that the rule of the *Ward* case, so construed by the Supreme Court of the United States in the *Hunt* case, measures the jurisdictional amount. The same interpretation of the *Ward* case was made in *Packard v. Banton*, 264 U.S. 140, 44 Sup. Ct. 257, 68 L. ed. 596. Any effort to apply the *Ward* case as an authority for the defendant viewpoint rule is obviously unsound.

Thus far we have devoted ourselves to an exploration of the sources and authorities which are claimed by the appellant to support the defendant viewpoint rule. We have referred, on a number of occasions, to

our primary proposition that this rule is not recognized by the modern decisions of the Supreme Court of the United States.

It is high time to consider those cases in this brief. Equally the time has come for a clear cut adoption by the lower federal courts of the principles announced by the Supreme Court in those cases, so as to dispose of the erroneous defendant viewpoint rule once and for all.

This Court knows that the Supreme Court of the United States has very recently not only announced certain strict rules for testing the jurisdiction of the federal courts, but also has imposed upon the courts the duty of making an independent inquiry into the existence of jurisdiction even in those cases where the parties have not seen fit to raise the question themselves. It has unqualifiedly taken the position that the presence of the jurisdictional amount must clearly appear, and that the burden of showing that the jurisdictional amount is present is cast upon the plaintiff. These principles and others were most positively brought to the attention of the bench and bar in the cases of *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178, 56 Sup. Ct. 780, 80 L. ed. 1135, and *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 57 Sup. Ct. 197, 81 L. ed. 183, both decided in 1936. As is demonstrated by the opinions in those cases, the principles there announced so emphatically were not new, but had adequate support in the earlier authorities; not only so but also the principles of the two cases cited have been reaffirmed in a number of subsequent cases.

The principles announced in the two cases cited, as well as in many preceding and following them, include the plaintiff viewpoint rule as the only rule from which the value of the matter in controversy can be tested.

Of the various decisions of the Supreme Court of the United States the one containing the clearest announcement of the plaintiff viewpoint rule is *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 36 Sup. Ct. 30, 60 L. ed. 174. In that case the plaintiff sought to compel the defendant to remove its poles and wires from the streets on the ground that they interfered with the equipment of the plaintiff. The trial court held that the jurisdictional amount was to be determined by taking the cost to defendant of removing its poles and wires. The Supreme Court held that it was erroneous to employ this defendant viewpoint test, and that the inquiry should have been limited to determining the value to the plaintiff of its right to maintain and operate its plant and conduct its business free from wrongful interference by the defendant. The exact language of the court on this subject is as follows:

“We are unable to discern any sufficient ground for taking this case out of the rule applicable generally to suits for injunction to restrain a nuisance, a continuing trespass, or the like, *viz.*, that *the jurisdictional amount is to be tested by the value of the object to be gained by complainant.*” * * *

“The district court erred in testing the jurisdiction by the amount that it would cost defendant to remove its poles and wires where they con-

flict or interfere with those of complainant, and replacing them in such a position as to avoid the interference. Complainant sets up a right to maintain and operate its plant and conduct its business free from wrongful interference by defendant. This right is alleged to be of a value in excess of the jurisdictional amount, and at the hearing no question seems to have been made but that it has such value. *The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction.*"

It should be observed that the court in the *Glenwood* case treated *Mississippi & Mo. R. Co. v. Ward*, 2 Black 485, *supra*, in the same manner as was done by *Hunt v. New York Cotton Exchange*, 205 U.S. 322, 27 Sup. Ct. 529, 51 L. ed. 821, where it was said that jurisdiction "is to be tested by the value of the object to be gained by the bill."

In the *Hunt* case the suit was one by the Cotton Exchange to enjoin the use of market quotations, issued by the Exchange, without first obtaining its consent. The court held that jurisdiction was to be tested by the value to the plaintiff Exchange of the right asserted by it. In so holding the court said:

"The object of this suit is to protect this right. The right therefore is the matter in dispute and its value to the Exchange determines the jurisdiction * * *."

This test of the value of the right to the plaintiff, not of the possible financial loss to the defendant, runs through all of the modern decisions of the Supreme Court of the United States.

Thus, in *KVOS, Inc. v. Associated Press*, *supra*, the

court, in holding that existence of the necessary jurisdictional amount was not shown, said:

"The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. No facts are pleaded which tend to show the value of that right."

Likewise, in *McNutt v. General Motors Acceptance Corporation*, *supra*, the court directed its entire inquiry to the value of the right asserted by the plaintiff. The court said:

"Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. *Hunt v. New York Cotton Exchange*, 205 U.S. 322; *Bitterman v. Louisville & Nashville R. Co.*, 207 U.S. 205; *Berryman v. Whitman College*, 222 U.S. 334; *Glenwood Light Co. v. Mutual Light Co.*, 239 U.S. 121; *Healy v. Ratta*, 292 U.S. 263. * * * The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed."

In the later decision of *Gibbs v. Buck*, 307 U.S. 66, decided in 1938, the plaintiff sought to enjoin enforcement of a statute prohibiting plaintiff from carrying on its business in the manner which it had formerly done. In considering the problem of jurisdictional amount the court said:

"Under such circumstances, the issue on juris-

diction is the value of this right to conduct the business free of the prohibition of the statute.”

In further discussion of the problem, the court in *Gibbs v. Buck*, *supra*, reviewed the *McNutt* and *KVOS* cases, and in so doing recognized that the sole inquiry into jurisdictional amount concerned value of the right asserted by the plaintiff.

Buck v. Gallagher, 307 U.S. 95, decided in 1939, was similar on its facts to *Gibbs v. Buck*, *supra*. In *Buck v. Gallagher* the plaintiff sought to enjoin a Washington statute prohibiting the conduct of plaintiff's business, upon the ground that the statute was unconstitutional. In discussing the question of jurisdictional amount, the court said:

“Whether a state statute is regulatory or prohibitory, when a bill is filed against its enforcement under §266 of the Judicial Code, the matter in controversy is the right to carry on business free of the regulation or prohibition of the statute.”

See also *Lion Bonding Company v. Karatz*, 262 U.S. 77, 43 Sup. Ct. 480, 67 L. ed. 871.

In all of the foregoing cases the principle is clearly established that the right asserted by the plaintiff is the “matter in controversy,” which the statute says must have the necessary jurisdictional value of \$3,000. The opinions speak only of the value of the right or the value of the object to be gained, both of which phrases are consistent only with the plaintiff viewpoint rule. There is not a syllable in these decisions recognizing the alternative standard mentioned by the *Cowell* case. If this alternative rule of the *Cowell* case were the proper one, the Supreme Court, in all of the

cases cited where jurisdiction was denied, would be in the position of having considered only one-half of the problem before it. Having found, in such cases, that jurisdiction did not exist from the plaintiff's standpoint, it would of necessity in each case have to then view and dispose of the case from the defendant's standpoint. That it has never seen fit to do so, and has in the most positive language confined itself to a discussion of the value of the right to the plaintiff, is the clearest evidence that the court is committed to the plaintiff viewpoint rule as the sole test of jurisdiction.

If there could be any doubt left on this subject, it would be disposed of by that line of cases of which *Thompson v. Gaskill*, 315 U.S. 442, 62 Sup. Ct. 673, 86 L. ed. 611, is the most recent example. In that case, as in many others preceding it, the action was brought by a number of plaintiffs whose claims individually were less than the jurisdictional amount, but in the aggregate exceeded that amount. The rule announced in *Thompson v. Gaskill*, and in a long line of cases preceding it, and involving the same problem, is that the claims of the plaintiffs cannot be aggregated to meet the requirements of jurisdictional amount unless the claimants have an undivided interest in a common fund. In other words, where their interests are several, aggregation cannot be made to give the court jurisdiction. It is perfectly obvious that an application of the defendant viewpoint rule in these cases would sustain jurisdiction. To revert to the exact language of the *Cowell* case, "the sum or value of that which the defendant will lose if the complainant suc-

ceeds in his suit," would certainly be in excess of \$3,000 in all of these cases. Despite this fact, the Supreme Court of the United States has never even suggested that jurisdiction could be sustained in this class of cases upon the basis of the defendant viewpoint rule.

Clay v. Field, 138 U.S. 464, 11 Sup. Ct. 419, 34 L. ed. 1044;

Wheless v. St. Louis, 180 U.S. 379, 21 Sup. Ct. 402, 45 L. ed. 583;

Rogers v. Hennepin County, 240 U.S. 136, 36 Sup. Ct. 345, 60 L. ed. 566;

Scott v. Frazier, 253 U.S. 243, 40 Sup. Ct. 503, 64 L. ed. 883;

Clark v. Paul Gray, Inc., 306 U.S. 583, 59 Sup. Ct. 744, 83 L. ed. 1001.

We have observed on several occasions that the lower federal courts have been prone to quote the language of the *Cowell* case in defining the test of jurisdiction. It must not be understood, however, that all of the lower federal courts have adopted this language and disregarded that of the Supreme Court. For example, this court itself in *Electro-Therapy Products v. Strong*, 84 F.(2d) 766, said:

"The matter in controversy is the right which appellant asserts and seeks to have protected and enforced, namely, the right to have the inventions above referred to assigned to appellant, and to no one else. *The District Court's jurisdiction is to be tested by the value of that right. McNutt v. General Motors Acceptance Corp.*, 298 U.S., 56 S. Ct. 780, 80 L. ed., decided May 18, 1936."

And the Circuit Court of Appeals for the Second

Circuit, in *Central Mexico Light & Power Co. v. Munch*, 116 F.(2d) 85, specifically recognized the correctness of the plaintiff viewpoint rule, saying:

“* * * Plaintiffs assert, however, that in a claim for injunction against these defendants their separate ownerships are not controlling, and that the value of the interest to plaintiffs is the test. This, the so-called plaintiff’s viewpoint test—disclosed by Judge Dobie in 38 Harv. L. Rev. 733, and in 1 Moore’s Federal Practice 511, 512 and 49 Yale L. J. 274—seems now well settled; but the cases require of the plaintiffs precision in showing exactly what interest the injunction is to protect and that its value exceeds \$3,000. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S. Ct. 780, 80 L. ed. 1135; *Kroger Grocery & Baking Co. v. Lutz*, 299 U.S. 300, 57 S. Ct. 215, 81 L. ed. 251; 49 Yale L. J. 274. As is pointed out in *Healy v. Ratta*, 292 U. S. 263, at 270, 54 S. Ct. 700, 703, 78 L. ed. 1248, the ‘policy of the statute’ defining federal jurisdiction, 28 U.S.C.A. §41 (1), and ‘due regard for the rightful independence of state governments’ both call for a strict construction of jurisdictional requirements.”

Likewise, the Circuit Court of Appeals for the Fourth Circuit, in *Purcell v. Summers*, 126 F.(2d) 390, uses the following language:

“It is well settled that the measure of jurisdiction in a suit for injunction is the value to plaintiff of the right which he seeks to protect.”

Although the Circuit Court in the latter decision reversed the decision of the District Court for the Eastern District of South Carolina upon the ultimate point there involved, it did affirm the decision of the

lower court upon the question of jurisdiction. In the District Court decision in *Purcell v. Summers*, 34 F. Supp. 421, the District Court in passing upon the question of jurisdiction discussed the plaintiff viewpoint rule in some detail and came to the conclusion that this was the only correct rule, stating:

“It is believed that subsequent and more recent decisions have, however, established the principle that the matter in dispute is the right the plaintiff seeks to protect.”

By way of re-emphasis, the Circuit Court for the Ninth Circuit has in effect followed the rule announced by it in *Electro-Therapy Products v. Strong*, *supra*, in the decision of *Gavica v. Donagh*, 93 F.(2d) 173. In that case the court, in discussing jurisdiction, speaks constantly of the rights of the plaintiff and finds that those rights do not have the necessary jurisdictional value.

Other decisions of the lower federal courts likewise recognize this principle, but the foregoing sufficiently illustrate the point under discussion.

The appellant in its brief has referred to certain statements of the text writers announcing the existence of the defendant viewpoint rule. An examination of the texts quoted will reveal that the statements do not represent any independent judgment upon the part of the text writers but are simply made on the authority of the *Cowell* case and similar decisions, and thus rise no higher than the equivalent statements of appellant's counsel in appellant's brief, which are based upon the same authorities. Appellant does not refer to the one really excellent, scholarly and

critical discussion of the plaintiff viewpoint-defendant viewpoint controversy, which is an article by Armistead M. Dobie, author of *Dobie on Federal Procedure*, appearing in 38 *Harvard Law Review* 733. We shall not attempt to review Judge Dobie's excellent commentary other than to state that it utterly disposes of the defendant viewpoint rule as a valid theory. The author cites and discusses all of the pertinent authorities. We join with Judge Dobie in the view that *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, *supra*, 239 U.S. 121, 36 Sup. Ct. 30, 60 L. ed. 174, should have settled this controversy once and for all and that the myriad of conflicting decisions in the lesser federal courts should thereafter have ceased to afford a ground for controversy. We have no doubt that the *Glenwood* case did settle the matter for the Supreme Court of the United States, and that the principles so frequently announced by that court, and recognized by the court before which this appeal is to be heard, should be applied here to deny jurisdiction of the federal courts in this case.

JURISDICTIONAL AMOUNT DOES NOT EXIST AS TO THE FIRST MATTER IN CONTROVERSY.

As already noted, the parties have employed the designation "first matter in controversy" with respect to the question of whether the executors of Blethen, Sr. or the trustees named in the contract of December 30, 1929, should vote Blethen, Sr.'s Class B stock of the Seattle Times Company and his stock in The Blethen Corporation during the period of probate. The appellant has relegated this matter in controversy to

a secondary position in its brief as a basis for supporting the jurisdictional amount. The argument that jurisdictional amount can be based upon this first matter in controversy is so obviously untenable that we do not wonder that this point has been subordinated in appellant's brief. We are only surprised that it is seriously advanced at all as a basis for sustaining jurisdiction. That it cannot involve the jurisdictional amount is established beyond all peradventure of doubt by the following propositions:

First. That no cause of action is stated with respect to this matter of controversy because under the law of the State of Washington the executors of one dying testate have, as a matter of law, the title, management and control of the personal property of the decedent. Consequently, any agreement to create a trust by will contemplates only that the trust shall commence upon the expiration of the probate proceeding.

Second. That even if it were legally possible for the trustees to assume title, possession or control of the corporate stock during probate, the matter in controversy, concerning as it does solely the voting power on such stock, would not, under the facts of this case, be susceptible of valuation in terms of money. In the same connection it may be further observed that the appellant, as plaintiff in the court below, did not meet the burden of proof to show that the value of the trust was \$3,000, or any other sum.

NO CAUSE OF ACTION IS STATED ON THE FIRST MATTER IN CONTROVERSY BECAUSE UNDER THE LAWS OF THE STATE OF WASHINGTON THE EXECUTORS OF A DECEDENT HAVE THE TITLE, MANAGEMENT AND CONTROL OF HIS PERSONAL PROPERTY DURING PROBATE TO THE EXCLUSION OF THE TRUSTEES NAMED IN HIS WILL.

It must be kept in mind that the will of Blethen, Sr. is silent as to the vesting of the voting power on the stock during probate. This contract and the others simultaneously executed were obviously prepared with care, and it naturally must be assumed that this omission was deliberate. Even if such were not the case, however, any contractual provision which would deprive the executors of the ownership, management or control during the period of probate would be, and is, unenforceable under the law of the State of Washington.

It is a fundamental principle of law of the State of Washington that title to the personal property of a decedent vests in his personal representatives immediately upon his death, and that no interest can be acquired by any other person therein until such property has been distributed in the probate proceeding. As a matter of fact, the rule of this State goes even further and gives to the executors complete possession and control of real estate, even though the technical title to such property, in contrast to that of personal property, vests in the heirs immediately upon death.

The Washington rule is stated in Remington's Revised Statutes, Section 1464, in the following language:

“Every executor or administrator shall, after

having qualified, by giving bond as hereinbefore provided, have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees, and shall keep in tenantable repair all houses, buildings and fixtures thereon, which are under his control."

And more specifically, in the case of non-intervention executors, Remington's Revised Statutes, Section 1463 provides:

"Executors acting under wills such as are mentioned in the last preceding section shall have power, after the filing of an inventory of the estate, if the said estate has been adjudged solvent, to mortgage, lease, sell and convey the real and personal property of the testator without an order of the court for that purpose and without notice, approval or confirmation, and in all other respects administer and settle the estate without the intervention of the court."

The Supreme Court of the State of Washington has, on numerous occasions, recognized the exclusive rights of the executor as to the possession and management of both real and personal property during probate and as to the title of the executor in the personal property during the same period. Thus, in *Bishop v. Locke*, 92 Wash. 90, 158 Pac. 997, the devisee of an undivided one-half interest in certain real estate sought partition during the period of probate. In denying relief the court said:

"* * * It is the settled law of this state that executors and administrators are entitled to the

possession and *control* of the property, both real and *personal*, of estates while being administered by them, as against heirs and devisees, as well as *all other persons*. Rem. & Bal. Code, §§1366, 1449, 1534; *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648; *Griffith v. James*, 91 Wash. 607, 158 Pac. 251."

And in the very recent decision of *In re Peterson's Estate*, 12 Wn. (2d) 686, 123 P. (2d) 733, at page 734 in the Washington Reports, the court said:

"We do not deny that, upon the death of Lars Peterson, the *title* to the real property comprising the bulk of his estate vested in his son, L. A. Peterson. But until he should complete the administration of the estate, his only right to possession of the real property and to the rents and profits therefrom derived from his appointment as administrator. Rem. Rev. Stat., §1464 (P.C. §9969); *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648; *Bishop v. Locke*, 92 Wash. 90, 158 Pac. 997; *Wendler v. Woodard*, 93 Wash. 684, 161 Pac. 1043. Only after an estate has been closed can the heirs, by acquiring these additional rights in the property, become entitled to treat it as their own."

Again, in *Collins v. Northwest Casualty Co.*, 180 Wash. 347, 39 P.(2d) 986, the court said:

"As to the right of Wallace, the specific bequest of the car would not be effective to confer upon him any control pending probate of the will. After probate, title vested in the executor, subject to the *claims of creditors* of the deceased. Title to the car could come to Wallace only through the executor at the close of administration.

"The personalty of the deceased goes prim-

arily to the executor or administrator as assets and not to the heir, and this has been held to be true even though there are no debts, and one claiming the personalty is the sole distributee. The title of an executor or administrator with the will annexed to particular personal property is not affected by the fact that it was specifically bequeathed or has been set aside for the payment of a particular legacy.' 23 C. J. 1127."

The court then continued to quote the same language which we have already quoted above from *Bishop v. Locke, supra*.

To the same effect see:

Gibson v. Slater, 42 Wash. 347, 84 Pac. 648;

Jones v. Peabody, 182 Wash. 148, 45 P. (2d) 915.

None of the foregoing Washington cases deals with the bequest or devise to a trustee, but the same principle is, beyond doubt, equally applicable in such a case.

The trustee named in the will is simply a legatee or devisee as is any other person, the only difference being that he takes his legacy or devise for the benefit of some other person rather than for himself. The fact that such a trustee acquires no rights whatsoever in the property until distribution has been made to him by the personal representatives of the decedent, is announced in the most emphatic terms by a large number of decisions from other jurisdictions.

In *In re Roach's Estate*, 50 Ore. 179, 92 Pac. 118, the court announced this rule as follows:

"* * * In the case supposed, a moment's re-

flection would seem to induce the conclusion that, when an executor lawfully secures possession of the property of a decedent's estate, any intermeddling therewith by a testamentary trustee, until the executor has been discharged, would be regarded by the probate court as the usurpation of its authority, for, as the testator's debts, funeral expenses, etc., must be paid before any trust can attach to the property, under a devise or bequest thereof, the jurisdiction of such court necessarily precedes that of an equity tribunal, and is therefore exclusive. When the *same* person has been appointed by a will to perform such dual duty, in respect to the property of an estate, no service is demanded of him as testamentary trustee until he has fully performed his executorial obligation and secured an order of the probate court discharging him and liberating his bondsmen. Thus in *Prindle v. Holcomb*, 45 Conn. 111, it was held that the probate records should show that an executor's account had been settled, before a testamentary trustee was entitled to take and hold the property of the estate for the purpose of the trust."

This rule was affirmed by the Oregon Court in *In Re McDermid's Estate*, 109 Ore. 633, 222 Pac. 295, where the court not only quoted from and relied upon *In Re Roach's Estate*, *supra*, but, in addition, said:

"The difficulty in this case is solved by mentally segregating the dual relation of Bourhill as executor from his relation to the estate as trustee under the will. The two offices are practically distinct; as much so as though Bourhill had been appointed executor of the will and some other person as trustee. His executorial

duties must first be performed before he can exercise his duties as a trustee."

The Supreme Court of Idaho, in *Jones v. Broadbent*, 21 Ida. 555, 123 Pac. 476, announces the same rule in the following categorical language:

"Before distribution, they held possession of all property of said estate as executors, not as trustees, and they, as trustees, would have no authority to meddle or interfere with the due administration of said estate until such administration had been completed, and until they had been discharged as executors, or until a partial distribution has been made.

"When the same person has been appointed by will to perform some dual duty, such as executor and trustee, in respect to the property of the estate, no service is demanded of him, as trustee, until he has performed his executorial obligations, and distribution is made. *In re Roach's Estate*, *supra*.

"In *Prindle v. Holcomb*, 45 Conn. 111, it was held that the probate records should show that an executor's account had been settled, before a testamentary trustee was entitled to take and hold the property of the estate for the purpose of the trust."

In addition, the Idaho court quotes further, in support of its opinion, from *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145, and also cites *In re Higgins Estate*, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116.

An even clearer and more positive statement appears in the case of *Newcomb v. Williams*, 50 Mass. 525, which is quoted at length in *In re Higgins*.

Estate, 15 Mont. 474, 39 Pac. 506. In the *Newcomb* case, as here, it was urged that it was intended that the trustee should assume his functions immediately upon the death of the testator, in disregard of any rights of the executor. The court held that such a thing was legally impossible. In so doing it discussed the pertinent rules at length, reaching the following conclusion:

“* * * *If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees, or of one or more trustees, for particular purposes, such direction would be nugatory and void; and, it being a will in which no executor is appointed, it would be the duty of the judge of probate to appoint an administrator with the will annexed, who would have all the powers of an executor, and in whom all the personal property would vest.*”

To the same effect see *In re Kachelmacher's Estate*, 40 Ohio App. 282, 178 N.E. 314; *Bellinger v. Thompson*, 26 Ore. 320, 37 Pac. 714.

The rules of the foregoing decisions are so well established that further citation of authorities would be tedious.

The appellant in its brief, although fully aware of the existence of this question, has devoted no discussion to it. Appellant would completely overlook the familiar rule, that before anyone, legatee, devisee, trustee, or otherwise, can acquire control of a decedent's property, that property must first go through the orderly course of probate, where it is at all times under the control of the personal representatives, who

themselves function under the jurisdiction of the probate court in the interest not only of the ultimate beneficiaries of the estate, but also of its creditors.

Appellant's position would strip the executors of the control of property which they must hold for the payment of any inheritance taxes to the State and Federal governments, for the satisfaction of the claims of creditors, for the expenses of administration, and for final distribution under an appropriate decree of the probate court.

And in asserting these propositions in its complaint, appellant states no cause of action because there is no provision in the contract entitling the trustees to vote the stock during probate, and if there were, it would be illegal and void.

EVEN IF THE COMPLAINT DID STATE A CAUSE OF ACTION AS TO THE FIRST MATTER IN CONTROVERSY, THE JURISDICTIONAL AMOUNT OF \$3,000 WOULD NOT BE PRESENT WITH RESPECT TO SAID MATTER BECAUSE THIS MATTER OF CONTROVERSY IS NOT SUSCEPTIBLE OF VALUATION IN TERMS OF MONEY.

The first matter in controversy concerns one thing only, that is, whether the voting of the stock during the period of probate should be controlled by the executors under the will or by the trustees, subject to arbitration as provided by paragraph Eight of the contract of December 30, 1929. Regardless of what form of words may be used to describe the situation, there is no escape from the fact, in the last analysis, that the question simply comes down to one of voting control. The appellant, in an effort to escape this ultimate fact, describes the right asserted as follows:

“It is the right to be put in position to protect an investment of approximately \$1,500,000.”

If this were an accurate statement, we would still maintain that it is impossible to place a monetary valuation upon such a right, but, in truth, such a definition of the right asserted is entirely inaccurate.

To state the matter involved in a most detailed manner, the appellant asserts that it is entitled to have this Court enter a decree under which three trustees, one of whom is a stockholder of the appellant corporation, shall have the right during probate to vote the stock, provided that any trustee who is in disagreement with the others shall have the further right to invoke arbitration by the then general man-

ager of the Associated Press, whose decision upon such question shall be final.

It would be difficult to conceive a right which would more effectively defy valuation in terms of money. Even if we were confronted here with the simple and fundamental question as to whether A or B, two individual persons, should vote a particular block of stock, it would be impossible to say what the right of either simply to vote the stock would be worth. It might be agreed that such a right in a particular case would be an important and a valuable one, but it would be impossible to give it a monetary valuation. In the present case, however, such impossibility of monetary valuation is far more apparent. Here the appellant asserts that the stock should be voted by three trustees. The decision of such a group, or a majority thereof, involves more elements of speculation perhaps than if the stock were to be voted by a particular person. However, the matter does not end even here, because, in the event of any division of opinion between the three trustees, any one of them would have the right to call upon the arbitrator for an ultimate decision. That arbitrator might decide for either of the factions as he saw fit under the circumstances. Consequently, in the final analysis, any valuation of the right to vote the stock in this case rests ultimately upon the value of an arbitration. This certainly is something that cannot be valued in terms of money.

We have repeatedly emphasized the necessity that the matter in controversy be susceptible of valuation in terms of money. That is exactly the position that

the courts have repeatedly taken. For better or worse, the Act of Congress conferring jurisdiction in cases based on diversity of citizenship, has fixed a value in money as an essential element for the exercise of jurisdiction. In this condition of affairs, the federal courts have long recognized that there are many rights undoubtedly of great value and priceless to the persons involved, but which are not capable of valuation in terms of money. In such circumstances the courts have consistently held that federal jurisdiction could not be exercised.

Thus in *Elgin v. Marshall*, 106 U.S. 578, 1 Sup. Ct. 484, 27 L. ed. 249, the court said:

"The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and, for that reason, excludes the jurisdiction of this court, in cases which involve rights that, because they are priceless, have no measure in money. Lee v. Lee, 8 Pet. 44; Barry v. Mercein, 5 How. 103; Pratt v. Fitzhugh, 1 Black 271; Sparrow v. Strong, 3 Wall. 97. But, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful constructions."

In *Kurtz v. Moffitt*, 115 U.S. 487, 65 Sup. Ct. 148, 29 L. ed. 458, the problem of rights not capable of valuation in money is extensively considered. That was an action in which it was sought to remove a *habeas corpus* proceeding from the state to the federal court. The Supreme Court reviews a large num-

ber of the earlier decisions involving the same question, and concludes with this very apt summary:

"From this review of the statutes and decisions, the conclusion is inevitable that a jurisdiction, conferred by Congress upon any court of the United States, of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money; and therefore that writs of habeas corpus are not removable from a State court into a Circuit Court of the United States under the act of March 3, 1875, ch. 137, §2, and this case was rightly remanded to the State court."

The case of *In re Red Cross Line*, 277 Fed. 853, is of special significance in the case at bar, because there the plaintiff sought specific performance of an agreement to arbitrate. As we have pointed out, arbitration is precisely what is ultimately involved in the first matter in controversy presented by the appellant in this case. In holding that the jurisdictional amount was not involved in an action to enforce an arbitration, the Court in the *Red Cross Line* case said:

"But, whichever ground of jurisdiction be relied on, there is not the jurisdictional amount involved. The value of an arbitration is one of convenience. No pecuniary value can be given to it, and a breach can only result in nominal damages. Street v. Rigby, 6 Vesey 815. Such a cause of action cannot be removed. Kurtz v. Moffit, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. ed. 458; Youngstown v. Hughes, 106 U. S. 523, 1

Sup. Ct. 489, 27 L. ed. 268; *DeKrafft v. Barney*, 2 Black 704, 17 L. ed. 350; *Whitney v. American Shipbuilding Co.* (D.C.) 197 Fed. 777.

“The overpaid charter hire is not here the matter in dispute, but solely the right of specific performance of the agreement to arbitrate. If the arbitration is ordered, the function of the court, so far as the proceeding instituted goes, ceases.”

In *Whitney v. American Shipbuilding Co.*, 197 Fed. 777, there was involved the right of the plaintiff, as a stockholder of a corporation, to examine books, papers, documents and records of the Company. As everyone knows, this right on the part of the stockholder may be one of very great value to him, but, like the right to vote his stock, it is not a valuation capable of determination in money. The court in this case, after reviewing the authorities, stated:

“I am unable to say that the right involved in this controversy has a value which can be calculated and ascertained in money, and for that reason the plea will be sustained and the cause remanded. * * *”

Earlier in the opinion the court had stated:

“The matter in dispute must be money or some right, the value of which in money can be calculated and ascertained.”

In *Youngstown Bank v. Hughes*, 106 U. S. 523, 1 Sup. Ct. 489, 27 L. ed. 268, the bank filed a bill in equity seeking to enjoin the county auditor from compelling the bank to respond to a subpoena and make available to the auditor its records pertaining to the accounts of its depositors, so that the auditor might pro-

cure information as to the accuracy of statements made by the depositors as to the taxable value of their property. Denying to the bank the relief sought, the court said:

“The present suit is not for money, nor for anything the value of which can be measured by money. The bank has no interest in the taxes to be placed on the tax duplicate. There is no property in dispute between the auditor and the bank. If the cashier is compelled to testify and to produce the books to be used in evidence for the purposes required, the damages, if any, resulting to the bank, would be, in the highest degree, remote and speculative. Certainly no suit for even nominal damages could be sustained against the auditor on account of what he had done.”

These authorities conclusively demonstrate that the first matter in controversy cannot be valued in terms of money and therefore cannot support jurisdiction.

IN ANY EVENT, AND ASSUMING UNDER SOME THEORY THAT THE FIRST MATTER IN CONTROVERSY WERE SUSCEPTIBLE OF VALUATION IN TERMS OF MONEY, APPELLANT HAS NOT SUSTAINED THE BURDEN OF PROOF TO SHOW HOW THIS IS SO.

The case of *McNutt v. General Motors Acceptance Corporation*, *supra*, 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135, laid down, among others, two rules in most emphatic terms. One is that the plaintiff at all times has the burden of proof on the issue of existence of the jurisdictional amount. The other is that this proof must show the actual value of the precise matter in controversy, and that the plaintiff does not satisfy this burden simply by showing that it has large financial interests forming the background of the litigation. On this second point the General Motors Acceptance Corporation set forth in its complaint numerous allegations as to the magnitude of its financial transactions and holdings in the State of Indiana. The figures representing these items were far in excess of the jurisdictional amount. The issue, however, was whether the State of Indiana had the power to regulate the business activities of the corporation, and the latter did not show how such regulation would affect it in the sum of \$3,000. Accordingly jurisdiction was denied.

The appellant here seeks to do precisely the same thing as the General Motors Acceptance Corporation did in the case cited. It alleges and emphasizes the magnitude of its financial holdings in the Seattle Times Company. It does not, however, allege or prove,

with respect to the first matter in controversy, one single thing which would indicate that it would be one dollar better or worse off if the stock is voted by the executors during probate rather than by the trustees. It has thus utterly failed to meet the requirements of burden of proof, and by reason thereof jurisdiction must be denied.

CONCLUSION

The dismissal of a cause by a federal court for want of jurisdictional amount does not involve a denial of justice to a litigant who has a meritorious cause. It directs him simply to proceed in the proper forum. Obviously, in the instant case, the state court is open to the appellant if it has any cause of action. The jurisdiction of the federal court is strictly prescribed by the statute, and in diversity cases one of the requisites is that the matter in controversy have a value in excess of \$3,000. The appellant has suggested that the purpose of this provision is to confine the activities of the federal courts to matters of large import. The statute and the decisions applying it say no such thing. Rather they require that a plaintiff who seeks to bring his cause to the federal court show that the value to him of the right asserted by him exceeds, in terms of money, the sum of \$3,000. Failing to do so, his case falls within the doctrine of strict construction repeatedly announced by the Supreme Court of the United States, and most excellently stated in *Healy*

v. Ratta, supra, 292 U.S. 263, 54 Sup. Ct. 700, 78 L. ed. 1248, in

“* * * the power reserved to the *states*, under the Constitution, to provide for the determination of controversies in *their* courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. See *Kline v. Burke Construction Co.*, 260 U. S. 226, 233-234. Due regard for the rightful independence of *state* governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. See *Matthews v. Rodgers, supra*, at 525; compare *Elgin v. Marshall*, 106 U. S. 578.”

The appellant, having failed to make the necessary showing of jurisdiction here, the decision of the District Court dismissing its action for want of jurisdiction should be affirmed and appellant left, if it sees fit, to initiate its suit in the proper forum.

Respectfully submitted,

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

RIDDER BROTHERS, Incorporated, a corporation,
Appellant.

vs.

RAE KINGSLEY BLETHEN, F. D. HAMMONS and WILLIAM K. BLETHEN, as Executors of the Estate of Clarence B. Blethen, Deceased; RAE KINGSLEY BLETHEN, FRANCIS A. BLETHEN; WILLIAM K. BLETHEN; JOHN ALDEN BLETHEN; CLARANCE B. BLETHEN; THE BLETHEN CORPORATION, a Corporation; and SEATTLE TIMES COMPANY, a Corporation,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

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IN THE
UNITED STATES
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RIDDER BROTHERS, Incorporated, a corporation,

Appellant.

vs.

RAE KINGSLEY BLETHEN, F. D. HAMMONS and WILLIAM K. BLETHEN, as Executors of the Estate of Clarence B. Blethen, Deceased; RAE KINGSLEY BLETHEN, FRANCIS A. BLETHEN; WILLIAM K. BLETHEN; JOHN ALDEN BLETHEN; CLARANCE B. BLETHEN; THE BLETHEN CORPORATION, a Corporation; and SEATTLE TIMES COMPANY, a Corporation,

Appellees.

No. 10504

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

I.

As to the second matter in controversy—

- (1) The suit is maintainable by appellant, and
- (2) As appellees stand to lose in excess of \$3,000, exclusive of interest and costs, the necessary amount is involved to give the lower court jurisdiction.

Appellees argue that under Washington law the only one who can sue is “the real party in interest”; and that, as the contract in question is one for the

benefit of Clarence B. Blethen II, he is "the real party in interest" and he alone can sue to enforce the contract. The case of *MacGerry v. Rodgers*, 144 Wash. 375, 258 Pac. 314, is cited in support of this argument. This case, as we read it, does not hold as contended by appellees. But the holding in the case, whatever it is, is of no importance here. This suit is in Federal Court. The rules of Federal Civil Procedure control. Rule 17(a) with respect to a contract for the benefit of a third party provides that the promisee may sue to enforce such contract without joining the third party as a party plaintiff. The rule reads as follows:

"(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, *a party with whom or in whose name a contract has been made for the benefit of another*, or a party authorized by statute *may sue in his own name without joining with him the party for whose benefit the action is brought*; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States." (Italics ours)

This rule, except for the last clause, is verbatim of Equity Rule 37, except that the word "expressly" is omitted.

The rules of civil procedure are controlling in all of the District Courts of the United States as to all procedural matters covered thereby.

Sibbach v. Wilson & Co. Inc., 312 U.S. 1, 61 S. Ct. 422, 85 L. ed. 479.

The subject of parties to litigation involve procedural rather than substantative rights.

- 1 Edmunds, Federal Rules of Civil Procedure, p. 1, and 1941 Cumulative Supplement, p. 1;
- 2 Moore's Federal Practice under the New Federal Rules, §17.12, p. 2074;
- 47 C.J., Parties, II (§14), p. 17;
- 21 C.J.S., Courts, §172,a, p. 266;
- 35 C.J.S., Federal Courts, §96,b, p. 964, § 123,b, p. 93;
- 39 Am. Jur., Parties, §3, p. 851, §18, pages 873 and 874, §21, p. 878.

So, in view of 17(a), the contention that, as to the second matter in controversy no cause of action is stated, and consequently no amount whatsoever is involved, because the right to maintain a suit to establish a trust in favor of Clarence B. Blethen II is vested solely in Clarence B. Blethen II, is without merit.

And we insist this is so even under Washington law.

The *MacGerry* case does no more than to hold that the plaintiff in her suit to recover damages, alleged to have been sustained by her by reason of breach of a contract partly for her benefit and partly for the benefit of her daughter, was limited in her recovery to the damages sustained by her. She sued to recover damages to her. The court said this consisted of support for herself and support for her daughter during her minority, the period during which she would be legally bound to take care of her daughter; that loss of support for the daughter after reaching majority did not constitute damages to plain-

tiff (the mother), but damages to the daughter and that the daughter upon reaching majority could sue to recover such damages. The case as we read it, is not one holding that one who makes a contract for the benefit of a third party cannot sue in his own name without joining the party for whose benefit the action is brought. The case simply cannot be construed as holding any such thing in the light of Washington statutory law.

Remington Revised Statutes, Wash. §§179 and 180 read as follows:

§179. "Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law."

§180. "An executor or administrator, a trustee of an express trust, a guardian of a minor or person of unsound mind, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another."

See:

Goodfellow v. First National Bank, 71 Wash. 554, 129 Pac. 90, 44 L.R.A. (N.S.) 580.

So, under the Washington law we find the suit at bar maintainable by appellant, that is, with reference to the suit as a suit for the benefit of Clarence B. Blethen II, a third party beneficiary under the contract in question.

For cases upholding suits by a person with whom or

in whose name a contract has been made for the benefit of a third party without joining the third party, under statutes similar in wording or in force and effect to the Washington Statute, see the cases cited in—

- 39 Am. Jur., Parties, §18, n. 1, p. 873; and
- 2 Moore's Federal Practice under the New Federal Rules, §17. 12, n. 3, p. 2074.

See also:

- 1 Restatement of the Law of Contracts, pages 158 and 164, and Washington Annotations thereto.

Federal Law of Contracts, Vol. II, §347, p. 46;

12 Am. Jur., Contracts, §273, p. 818;

13 C.J., Contracts, §815, p. 707.

Appellees concede that there are many decisions supporting appellant's contention that it is the pecuniary result to either party that controls but argue that the "modern" decisions of the United States Supreme Court indicate that the *sole* test is the value of the plaintiff's possible gain. We do not so interpret these cases. Moreover, it is significant that none of the authorities relied on by appellees overrule earlier decisions of the Supreme Court in which jurisdiction was sustained because the possible loss to the defendant exceeded the requisite amount although plaintiff's possible gain did not.

The first Supreme Court decision referred to by appellees is *Miller v. Clark*, 138 U.S. 223, 11 S. Ct. 300, 34 L. ed. 966. The plaintiff in the case, claiming a one-

sixth interest in an estate, sought to prevent an executor from delivering three bank books each representing \$1,792.61 to three persons in whose respective names they stood. These individuals, who were also defendants, likewise had a one-sixth interest each in the estate. The defendants challenged the jurisdiction of the Supreme Court (\$5,000 was then the requisite amount) "because the matter in dispute as to each of the defendants other than the executor does not exceed the sum or value of \$5,000."

While jurisdiction was denied "on the ground that the interest of the plaintiff does not exceed \$5,000," there is no significance in the Court's use of this language. The same result would necessarily have followed had the Court thought it necessary to comment on the defendants' possible loss. Individually, each defendant stood to lose one-half of \$1,792.61 (they would receive one-half of the sum through the estate if plaintiff was successful) and even collectively they could only lose one-half of \$5,377.83. In other words, the result had to be the same whether considered from the standpoint of plaintiff's gain or that of the defendants' loss. The Court was not called upon to choose between the two tests.

Bruce v. Manchester & Keene Railroad, 117 U.S. 514, 6 S. Ct. 849, 29 L. ed. 990 (page 23 of appellees' brief) likewise is no authority for appellees. Plaintiffs there sued to collect a small amount of delinquent interest on certain bonds and prayed that a mortgage securing the bond issue be foreclosed. In denying jurisdiction, the Court pointed out that payment to plaintiffs of a sum less than the requisite amount would

end the litigation. The much greater sums that would be involved by the possible foreclosure of the mortgage they regarded as "one of the collateral and indirect effects of the decree not to be considered in determining our jurisdiction." The inference is strong that had this latter been a more direct result, the Court would have considered the possible loss to the defendants in ruling on the issue.

Appellees rely strongly on *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 36 S. Ct. 30, 60 L. ed. 174 (pages 31 and 32 of their brief) but they are not justified in taking this position. The facts of the case are the exact converse of those in *Mississippi & Missouri Railroad Co. v. Ward*, 2 Black 485, 67 U.S. 485, 17 L. ed. 311, a leading case relied on by appellant. In the *Glenwood* case plaintiff's right to do business free of interference by the poles and wires of defendant was of substantial value while the cost to defendant of moving this equipment was less than the jurisdictional amount. The Court properly accepted jurisdiction, viewing the matter from the standpoint of the pecuniary result to plaintiff.

It is most significant that in reaching this result the Court relied principally upon and quoted from Mississippi & Missouri Railroad Co. v. Ward, supra, in which the Court found that jurisdiction existed because the loss to defendant exceeded the jurisdictional amount although the value to plaintiff was insufficient.

The Glenwood case, in effect, expressly approved and reaffirmed the Mississippi & Missouri Railroad

case. The two decisions taken together clearly establish that the Supreme Court approves of the rule as contended for by appellant, namely that the pecuniary result to each party must be considered.

The *Mississippi & Missouri* case was likewise relied on by the Supreme Court in *Hunt v. New York Cotton Exchange*, 205 U.S. 322, 27 S. Ct. 529, 51 L. ed. 821 (page 32 of appellees' brief). In that case the value of the right which plaintiff sought to protect exceeded the jurisdictional amount and there was no occasion to inquire into the possible loss that the defendant might suffer.

KVOS, Inc., v. Associated Press, 299 U.S. 269, 57 S. Ct. 197, 81 L. ed. 83, and *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178, 56 S. Ct. 780, 80 L. ed. 1135 (pages 32 and 33 of appellees' brief) are not helpful. In both cases the plaintiffs attempted to allege that the value of their respective rights exceeded the jurisdictional amount and in each instance the Supreme Court held that the pleadings were insufficient to establish jurisdiction. In neither case was any effort made to allege or show the amount of the defendants' possible loss and so the Supreme Court had no occasion to consider the problem from this standpoint.

Gibbs v. Buck, 307 U.S. 66, 59 S. Ct. 725, 83 L. ed. 1111, and *Buck v. Gallagher*, 307 U.S. 95, 59 S. Ct. 740, 83 L. ed. 1128 (pages 33 and 34 of appellees' brief) are sister cases dealing with the efforts of ASCAP to escape state control in Florida and Washington respectively. In each case, ASCAP, as plaintiff, alleged that the value to it of the matter in dispute

exceeded the jurisdictional amount and in both cases the allegations were held to be sufficient. In neither complaint was any reference made by the plaintiff to the possible loss that the defendants might suffer and again the Supreme Court had no occasion to consider the matter. The only issue created by the pleadings on the question of jurisdiction was the value to plaintiff of the right to carry on its business free of statutory regulations.

Lion Bonding Company v. Karatz, 262 U.S. 77, 43 S. Ct. 480, 67 L. ed. 871 (page 34 of appellees' brief) is not in point. In that action a common contract creditor brought suit against a corporation seeking to recover judgment on a \$2,100 debt and asking for the appointment of a receiver. The latter was denied because in the absence of statutory authority a receiver can not be appointed for a corporation at the suit of a simple contract creditor. The Court then went on to refuse jurisdiction because plaintiff was seeking to recover less than the jurisdictional amount. Here again the Supreme Court had no occasion to consider the possible loss to defendant.

On pages 35 and 36 of their brief appellees list half a dozen of the cases which follow the well established rule that the claims of various plaintiffs can not be aggregated to meet the requirements of jurisdictional amount unless the complainants have a common, undivided interest. This principal of law is simply an additional test to be applied under certain circumstances—it is not inconsistent with the rule contended for by appellant. For instance, the fact that defendant may lose more than \$3,000 will not alone confer

jurisdiction of a controversy upon a Federal Court. There must also be diversity of citizenship. Also, if there are several plaintiffs whose claims have been totalled to get the requisite amount, they must further meet the test outlined above. The doctrine of these cases is simply another and *additional* rule designed to prevent the circumvention of the statutory requirement by the joining of unrelated claims of insufficient amount.

Incidentally, in considering this latter group of cases, it should be noted that in the most recent (*Thompson v. Gaskill*, 315 U.S. 442, 62 S. Ct. 673, 86 L. ed. 951) the Supreme Court refers to the value of the matter in controversy as being the "*pecuniary consequence to those involved in the litigation*" (Italics ours).

Appellees refer (page 36) to this Court's decision in *Electro-Therapy Products v. Strong* (C.C.A. 9) 84 F.(2d) 766. In that case plaintiff sued to enforce a contract calling for the assignment to him of certain inventions. This Court held that the jurisdiction of the District Court was to be tested by the value of plaintiff's right to have the inventions assigned and pointed out that such value "depends, of course, on the value of the inventions." In other words, the value of plaintiff's possible gain was exactly the same as defendant's possible loss. This Court had no occasion to consider whether the matter should be viewed from the standpoint of the plaintiff or that of the defendant. There is nothing in this decision to indicate that this Court feels that in a proper case the loss to the

defendant can not be considered in connection with the determination of jurisdiction.

The decision in *Central Mexico Light & Power Co. v. Munch* (C.C.A. 2) 116 F.(2d) 85 (page 37 of appellees' brief) does not suggest that the Circuit Court for the Second Circuit is committed to the rule contended for by appellees but, on the contrary, indicates that they approve the test urged by appellant. In this action plaintiff, a public utility, sued to restrain three individual holders of its bonds from the further prosecution of suits brought on the obligations. No one of the defendants held as much as \$3,000 of the bonds.

In determining whether or not jurisdiction existed the Court considered the problem at length from the standpoint of the possible loss to the defendants and debated whether their respective holdings could be aggregated for the purpose of meeting the requisite amount. They held that the allegations of the complaint fell short of establishing the exception (as laid down in *McDaniel v. Traylor*, 196 U.S. 415, 25 S. Ct. 369, 59 L. ed. 533) to the rule prohibiting the aggregation of distinct claims.

Plaintiffs, conceding that jurisdiction could not be sustained from the standpoint of the possible loss to defendants if the latter's claims were considered separately, also argued that the application of the test from the plaintiff's viewpoint established that jurisdiction existed. On this phase of the matter they contended that the value to them of the interest which they were seeking to protect exceeded \$3,000. The

Court held, however, that the showing made by plaintiffs on this point likewise failed to establish their contention.

It is apparent that the Circuit Court examined this case from the standpoint of both parties and concluded that there was no showing that the possible pecuniary result to either plaintiffs or defendants established jurisdiction.

Purcell v. Summers (C.C.A. 4) 126 F.(2d) 390 (page 37 of appellees' brief) is not helpful. This was a suit brought by certain bishops of the Methodist Church against various representatives of an organization that was seeking to appropriate the name of the Methodist Episcopal Church, South, and the use of its properties. Plaintiffs asked for an injunction preventing this and for a declaratory judgment establishing that the merger of several Methodist Churches (including the Methodist Episcopal Church, South) was valid. The church properties involved ran into millions of dollars and it was conceded that the right to control the name alone was of great value. Plaintiff relied upon the value to it of the properties and the right to the name and the Court found that these were sufficient to confer jurisdiction.

It is obvious that in this case the value of the matter in controversy was exactly the same when viewed from the standpoint of the plaintiff as when regarded from the defendant's viewpoint. The court had no occasion to choose between the two rules and the fact that they refer to "the value to the plaintiffs" as being the test in no way indicates that they would not

consider the pecuniary result to the defendant in a proper case.

Brief reference is made by appellees (page 38) to the District Court decision in the foregoing case. *Purcell v. Summers*, 34 F. Supp. 421. The lower court took the same view of the matter as did the Circuit Court and our discussion of the latter's decision applies equally to the opinion of the lower court. Incidentally, the discussion of this point by the District Court is pure dictum as the court went on to deny jurisdiction, basing its conclusions "entirely on the fact that the State Courts * * * have taken possession of the res * * *."

The last case relied on by appellees (page 38) on this point is *Gavica v. Donagh* (C.C.A. 9) 93 F.(2d) 173. In this case four groups of sheep raisers sued together to establish their right to graze sheep on public lands free of interference by the defendants. It was alleged that the matters in controversy exceeded the jurisdictional amount but there was no claim that any one of the four causes of action when considered separately involved the requisite sum. The four matters were distinct and several and no facts showing a common, undivided interest were alleged. This Court properly held that under such circumstances the matters could not be aggregated for the purpose of conferring jurisdiction. As is common in so many injunction cases, the Court in this decision speaks of the matters in controversy as being the rights which the various plaintiffs assert and seek to have protected. But there is nothing in this statement to indicate that the possible consequence to the defendant

can not be considered when the occasion therefor arises.

It is significant that all of the research conducted by counsel for both parties has failed to disclose a single case in which a court has deliberately weighed the rule contended for by appellant against that sought for by appellees and then, adopting the latter, concluded that the matter must be viewed *solely* from the standpoint of the plaintiff. It is important to note that in those cases in which it has been necessary to choose between the two principles, the Court has *in all instances* applied the test that it is the pecuniary result *to either party* that controls.

II.

As to the first matter in controversy,

- (1). A cause of action is stated, and
- (2). The jurisdictional amount is involved.

The Supplemental Agreement as amended (Tr. 56 to 79) provides that Mr. Blethen should execute a will or other instrument providing that his Class B common stock be held in trust by three trustees "after his death" for a period of 21 years and that Mr. Blethen should provide in such will or other instrument that, in event of any difference of opinion between the trustees as to any question connected to the management of the corporation, any trustee might submit such question for arbitration to the general manager of the Associated Press whose decision was to be conclusive.

These provisions of the Supplemental Agreement,

particularly when considered in connection with the balance thereof and in connection with the main contract (Tr. pages 31 to 56), show, we contend, that it was the intention of the parties that control of the Seattle Times Company and the newspaper being published by it should pass to the trustees *immediately upon the death of Mr. Blethen* and continue until December 30, 1950. That such was the intention is demonstrated conclusively by the proposed will submitted by Mr. Blethen to the Ridders on or about June 28, 1930 (Tr. 11 to 16). It set up the trust as required by the Supplemental contract naming Rae K. Blethen, Elmer E. Todd and Bernard H. Ridder as trustees. These were the persons named in the Supplemental Agreement as the ones to be trustees. The will also named these same persons as executors and provided with respect to both trustees and executors that, in case of any difference or differences of opinion as to any question connected with the management of Seattle Times Company, such difference should be submitted to the manager of the Associated Press, and that his decision would be conclusive. This will clearly indicates an intention on the part of Mr. Blethen that control of the Seattle Times Company and the newspaper being published by it was to pass *immediately upon his death* to those designated as trustees in the Supplemental Agreement. This intention is shown by the following significant facts:

1. Mr. Blethen named identically the same parties as executors who are named as trustees in the contract.
2. He provided that during the period of administration of his estate, the executors should vote

the stock exactly in accordance with the agreement.

3. He provided that the trustees should vote the stock exactly in accordance with the agreement.
4. He provided that disputes both between the executors and between the trustees should be submitted to the general manager of the Associated Press for conclusive decision.

The proposed will was both an expression of Mr. Blethen's intention and his practical construction of the Supplemental Agreement. To restate the matter the words, "after death" as used in the Supplemental Agreement mean effective *immediately upon death* and, if the words "after death" are ambiguous as to meaning, Mr. Blethen by the proposed will gave practical construction to the words and through such construction fixed such a meaning upon them.

In this same connection it is significant to note the language of paragraph nine of the Supplemental Agreement of December 30, 1929 (Tr. 61). This paragraph provides that in the event of Blethen's becoming incompetent, there shall be appointed as his guardians "*the persons hereinabove specified to be the trustees under such last Will and Testament.*" (Italics ours)

The fact that Mr. Blethen in this paragraph referred to "the trustees under such last Will and Testament" clearly indicates that all of the parties intended that these individuals should assume their trust while the will and estate were still in the process of administration.

The Ridders, under the terms of the contract here-

inabove referred to, made a very substantial investment in the Seattle Times, contributing approximately \$1,500,000. Both Mr. Blethen and the Ridders were concerned with the question as to the management of the Seattle Times Company and its newspaper upon and following the death of Mr. Blethen. It seems to us that it is apparent that the intention of both was that *immediately* upon Mr. Blethen's death the Ridders, through the designation of one of them as a trustee and through the arbitration provision, should have a voice in the management of the Seattle Times Company and the newspaper in order that the Ridders might be in a position to look after and protect their investment. It is perfectly apparent that, if the Ridders were to be given this protection, they should be put in this position immediately upon the death of Mr. Blethen. We insist that this is what the parties had in mind when they made use of the words "after his death" in paragraph "Eighth" of the Supplemental Agreement. It seems plain that, in making use of the expression "trustees" in the Supplemental Agreement, the parties did not have any technical definition or meaning in mind but rather had in mind persons to take charge of the situation immediately upon the death of Mr. Blethen. It is absurd to reason that this voice and this control were to be postponed until Mr. Blethen's estate should be probated to conclusion. This, everyone knew, would probably take several years. It just does not stand to reason that there was to be an interim of several years before the trustees were to function and the control afforded the Ridder Brothers was to be operative.

The defendants argue that the intention of the parties was that the trustees should take over following the completion of the administration of Mr. Blethen's estate. To say that this was the intention might well result in the defeat of the whole trust program, as outlined in the Supplemental Agreement. It is to be noted that Mr. Blethen's last will is a non-intervention will under the Washington Statutes. This means that the executors may go on for years, and in fact the will itself contemplates that the executors may still be functioning in the year 1951, for by its terms it provides:

“that my executors shall not, prior to the 30th day of January, 1951, sell, pledge, hypothecate or encumber any of the Class B common stock of Seattle Times Company, without the consent of Ridder Brothers, Incorporated.” (Tr. 23, 24)

The trust period expires in 1950, so if we are to say that the Supplemental Agreement is to be construed as providing that the trustees shall not take charge until the estate of Mr. Blethen has been probated to conclusion, then we are advancing a construction which may well result in a total and complete defeat of the trust program as set forth in the Supplemental Agreement. Contracts are not to be given such construction as will result in absurdity. It is absurd to contend that Mr. Blethen and the Ridders had in mind that a construction be placed upon the Supplemental Agreement which might result in a defeat of its purpose. The only reasonable construction which can be placed upon the Supplemental Agreement is the one for which we contend, namely, that the trustees were to have possession and control of the stock in

question immediately upon the death of Mr. Blethen.

As to the meaning of the expression "after death" reference might be made to decisions like *In re Swinburne*, 16 R.I. 208, 14 Atl. 805. In this case a will gave certain shares in the testator's estate to his children and "after their death" to the testator's living heirs. The court said:

"It seems to us that 'after their death' obviously means immediately after their death, not an indefinite length of time thereafter; the words being introduced to fix definitely the time at which the bequest over is to take effect."

See also *In re Melcher*, 24 R.I. 575, 54 Atl. 379, where it was held that "upon death" and "after death" were synonymous.

Mr. Blethen, by his last will, breached the Agreement between the parties in that he did not make provision for the transfer of the Class B common stock of the Seattle Times Company and the stock of The Blethen Corporation immediately upon his death to the designated trustees. By providing in his last Will as he did he postponed the transfer of these stocks, or the possession and control thereof, to these trustees for the lengthy period it will take to probate his estate. The will involved is not subject to attack. It is entitled to probate as drawn. However, the contract between the parties, referring of course to the Supplemental Agreement of December 30, 1929, can be enforced in a suit in equity. That is what appellant seeks to do in this action.

Partial distribution of the estate is perfectly proper and can be ordered at any time. However, if for any

reason, such partial distribution is thought unwise, undesirable or improper, the agreement of the parties can be carried out and the necessary protection afforded to the Ridders by the simple expedient of granting the second prayer of plaintiff's complaint and decreeing that the executors hold the stock in trust for the trustees, that they vote the same as directed by the trustees and that in case of any difference or differences of opinion between the said trustees as to any question connected with the management of Seattle Times Company, that upon the request of any of the said trustees, they submit said difference or differences to the General Manager of the Associated Press for his decision.

That the right which plaintiff seeks to assert in this so-called first matter in controversy is of substantial value and meets the jurisdictional requirements of the District Court is amply demonstrated by the argument and authorities set forth in appellant's opening brief. It is the right to protect and to some extent control an investment of over a million and a half dollars. It seems idle to even suggest that the value to plaintiff of this right does not exceed the requisite jurisdictional amount.

Respectfully submitted,

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